BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF DAY 5 OF TRIAL (27 JULY 2020)

Pursuant to paragraph 30 of the court's order made on 26 June 2020, what follows is a **draft** transcript.

A final transcript will be published when it is available.

The Financial Conduct Authority vs. MS Amlin Underwriting Limited and others

Day 5

July 27, 2020

Opus 2 - Official Court Reporters

Phone: +44 (0)20 3008 5900

Email: transcripts@opus2.com

Website: https://www.opus2.com

Monday, 27 July 2020

(9.58 am)

Submissions by MR TURNER (continued)

LORD JUSTICE FLAUX: Yes, Mr Turner.

MR TURNER: Could I start by correcting two references from Thursday. The first -- sorry, my Lord, your microphone is still on, so I am getting feedback.

Two reference corrections from Thursday. The first transcript reference {Day4/156:18}, the correct bundle reference for paragraph 2.10 of Riley, which contains the rationale for the material damage proviso, is {K/233/1}. Then transcript reference {Day4/160:6} Mr Edelman's reference to each line in the spreadsheet making its concurrent contribution to the cause, the correct reference is {Day2/140:21] to page 141 line 5.

Could I pick up with where we were in relation to RSA2. We had been looking at the relevant insuring provision, which is the public emergency extension, which your Lordship will find in RSA2.1 at {B/17/36}.

You will recall that in answer to a question from my Lord Mr Justice Butcher, I had suggested that the insuring provision should be read as if there were a comma after the word "emergency" in the second line, and another comma after the word "property".

In short, our submission remains that it is the

emergency which needs to be in the vicinity. We deal with this at paragraph 23 of appendix 2 to our written submissions which is bundle {I/18/38}.

In summary, normally an emergency and any relevant threat to life and property will be co-located. But if one steps back from the prism of COVID-19, the broad purpose of this clause is to provide an indemnity against the effect on access to insured premises of restrictions imposed by the emergency services, in the context of the emergency services dealing with emergencies.

By their very nature emergencies, which affect access to the premises are likely to be in the vicinity of the premises. Conversely, action taken to address emergencies in other areas are unlikely to cause disruption to access to the premises.

We can test that by taking the following scenario, which is perfectly plausible in the context of the police imposing cordons under section 33 of the Terrorism Act 2000:

Let's take the scenario where a cordon is imposed by the police who are acting on intelligence and the purpose of the cordon is to allow area A to be searched for detonators for a bomb. By themselves the detonators are harmless, but when they are combined in area B with

fertiliser currently stored in area C, they can lead to the endangerment of life and property in area B, where the bomb is going to be put together and planted.

The disruption of access to the premises in area A due to the police cordon is precisely the sort of event which one would expect to trigger the coverage under this sort of clause. Indeed, we say it would be odd if the coverage were not triggered simply due to the dislocation of the emergency in area A from the area in which life or property would be endangered.

Can I then turn, please, to sub-exclusion (b), which is the sub-exclusion during any period other than the actual period when access to the premises was prevented.

We say this means what it says. Its effect is to delineate the peril insured. Why the draftsman has chosen to use an exclusion to delineate the peril does not matter. We say that given the speeches of Lords Hodge and Toulson in Impact Funding at paragraphs 32 and 35, and just for the transcript the reference is {J/122/13} to page 14, we say that such an approach to drafting cannot be characterised as an obvious error which the court can correct by an application of the Chartbrook Leasing principle.

Nevertheless, the FCA's oral submissions in effect invite the court to apply Chartbrook Leasing, and in

response to that we say the following:

First, if this truly were an obvious error, the FCA would have taken the point in its reply; it did not do so. Again if it were an obvious error, it would have taken the points in its written submissions; it did not do so.

Paragraph 87 of the written submissions identify the exclusions which the FCA said were in issue, {I/1/38}; they do not include the sub-exclusion within the public emergency extensions in the Eaton Gate RSA2 policies.

Indeed, the FCA's position, at least until Mr Edelman commenced his oral submissions, and as set out in paragraph 621 of its skeleton argument at page 212 of the document on the screen -- could we see that, please {I/1/212} -- was that this is a standard form contract of a professional insurer. The reasonable reader would assume that care had been taken by those drafting and selling the policy, and any mistake would have been spotted and corrected.

If one assumes that we are correct as to the construction of sub-exclusion (e), there is then an issue as to the meaning of the word "prevented". We say that that requires a prohibition on the means of access and egress to and from the premises and we adopt Hiscox's submissions at paragraphs 108 to 115 of their

skeleton argument; reference {I/13/37} to 39, on which you may or may not shortly hear Mr Gaisman.

Sorry, that should be sub-exclusion (b), not (e).

We then move to the question of the correction of sub-exclusion (e) in RSA2.2., the page reference is 51.

My Lords, it is a short point, and you are either going to be with me or against me. It is a statement of the blindingly obvious. We say that there is an obvious mistake. As formatted, the exclusion does not read grammatically or naturally.

The fact of the mistake is both corroborated and made more obvious by considering the other extensions within the wording. Quite apart from the business interruption extensions at (b), (c) and (g) to which Mr Edelman drew your attention on Wednesday, those are at pages 50 to 51 of the wording, and all involve freestanding inner limits. There are a further eight extensions with freestanding inner limits in the material damage section, pages 21 to 23 of the wording. There are 14 extensions with freestanding inner limits in section 2, the contents section, pages 25 to 28 of the wording. There is a formatting error in relation to extension 2 of the contents section at page 26. If we could see that {B/18/26}.

If we can go back to the previous page so you can

see how this is set up. So removal of debris, what is not covered: any costs or expenses, and if the draftsman wasn't allergic to punctuation he might have put a colon there.

Then over the page, (a), (b), and (c), so what is not covered: any costs or expenses, any amount exceeding the sum insured on trade contents. More naturally that would have been a freestanding exclusion all by itself, but again, it appears that there has been a slight formatting error there, albeit not one that could conceivably give rise to doubt or scope for argument about its meaning.

There is one extension in section 3(b), and the reference for that is {B/18/32} of the policy. You will see extension capital A on page 32, and we gave an incorrect reference to that in paragraph 30(b)(iii) of appendix 2 to our skeleton argument, page {I/18/41}, we gave the wrong reference, but it is the extension on page 32 to which we should have referred.

There are then three further extensions in section 5 of the wording, on page 36, which include freestanding inner limits.

So if one steps back, there are a total of 28 extensions within this policy wording, excluding the one that you are concerned with, with freestanding inner

limits, albeit one has been incorrectly formatted. There is only one extension, the public emergency extension on page 51, with an inner limit expressed in ungrammatical terms on the same line as an exclusion.

We say in respect of both correct grammar and consistency with the other policy terms, that could be achieved or those aims could be achieved by making the correction which we propose.

My Lord, those are my submissions in relation to RSA2.

I am now going to move, if I may, to RSA3 for which our written submissions are set out in appendix 3, reference {I/18/49} and following.

The wording itself is at tab 19 of bundle B. {B/19/3} under the heading "Insuring Clause" the third paragraph down has a one document provision. The relevant insuring clause is to be found at page {B/19/38}. You have already seen it. Extension (vii):

"We shall indemnify you in respect of interruption of or interference with the business during the indemnity period following ..."

Then (iii):

"any occurrence of a notifiable disease within a radius of 25 miles of the premises."

You were taken to one of the clauses which followed a sub-heading at the bottom of page 38, "Additional definition in respect of Notifiable Diseases", a heading which might more naturally read "Special conditions in respect of Notifiable Diseases".

You were taken just to item 4, but could I ask you to start at item 2 of the additional definition.

"For the purposes of this clause:

"Indemnity period shall mean the period during which the results of the business shall be affected in consequence of the occurrence discovery or accident ..."

The words "occurrence discovery or accident" are deliberately chosen to hark back, if we can go back to page {B/19/38}, to the different triggers for cover within the infectious diseases exclusion, so sub-extension (a) has occurrence, discovery or occurrence, (b) is discovery, (c) is accident and then (d) is occurrence.

Go back to page 39, please, and then item 4 you were taken to, which is:

"We shall only be liable for the loss arising ought those premises which are directly affected by the occurrence discovery or accident ..."

Could I ask you to note the basis of settlement provisions which apply. Those can be found on pages 34

to 35, {B/19/34} to 35. Could you go there, please.
On page 34 is the basis of settlement if the coverage is written on a gross profit basis. Item (b):
"The insurance is limited to loss of gross profit due to ..."
Item (b):
"The sum produced by applying the rate of gross profit to the amount by which the turnover during the indemnity period shall fall short of the standard turnover in consequence of the incident ..."
And the "in consequence of" formulation again appears in the first subclause beneath that in the third line.
You will find similar wording in the gross revenue basis settlement clause which follows.
There is also a special provision --
LORD JUSTICE FLAUX: Where do I find the definition of "incident", Mr Turner?
MR TURNER: The definition of "Incident" includes "material damage". Let me just ... it is page 33, my Lord. {B/19/33} item (a). I think we looked at it on Thursday afternoon.
So this falls within the overall scope of the submissions I was making on Thursday afternoon about the engagement of the quantification machinery within the

non-damage extensions to various policies.
Back on page {B/19/34} there is also, under the heading of "Vicinity", a special provision applicable to the extension which is a trends or adjustment clause. I use those words as shorthand and as shorthand only. But again, those words impose a requirement to conduct a "but for" analysis for the purposes of the quantification of loss. Again on the assumption that that provision is engaged by a non-damage extension, as we say it is.
Moving on, could I go forward to page {B/19/91}. The start of the general exclusions which are expressed to apply to all sections of the policy unless otherwise stated. One sees that at the top of page 91.
Then on page 93, you have already seen general exclusion L, which is stated to be applicable to all sections other than the employers and public liability covers, and it is then headed "... Contamination or Pollution Clause".
In the context of its heading of "... Contamination or Pollution Clause" could I then take you to page {B/19/86}, where you have general conditions in relation to interpretation, some of which are numbered and some of which at random are not. Under 10.9 you will find a separate general condition in relation to

interpretation:
"In this policy ...
Then item (e):
"The headings are for reference only and shall not be considered when determining the meaning of this policy."
My Lord, there are, I would suggest, three particular --
MR JUSTICE BUTCHER: You draw our attention to that because that is a point against you, effectively.
MR TURNER: No. Mr Edelman relies on the heading "... Contamination or Pollution Clause" for the purpose of construing the subclauses which follow. He explicitly did so in his oral submissions.
MR JUSTICE BUTCHER: Okay. I mean, in a sense it just doesn't really help very much.
MR TURNER: I'm going to move on for now, my Lord, but we will come back to it in a moment.
My Lord, there are three issues specific to RSA3 at a high level. I am going to address two of them this morning.
The first one is: does the word "following" within the relevant insuring provision indicate a requirement for a looser test than "proximate causation"?
The second is the proper construction and effect of

general exclusion L.
The third would be the relevance and effect of the adjustments special provision, but I'm not going to address that separately in oral submissions because it comes under the cover of the submissions which I made on Thursday afternoon at a level of generality. And you know that we say that that provision does apply to non-damage extensions, and we say it should be construed and applied in a manner which is faithful to its wording.
Turning to the first of the two issues which I am going to address, which is: does the word "following" import a requirement for a looser test than "proximate causation"? The starting point is section 55 of the 1906 Act and the requirement that a proximate causal relationship is required unless the policy provides otherwise.
In making its assessment as to whether the policy does otherwise require, the court should not draw nice distinctions between varieties of phrases used; and for that we cite the Insurance Disputes book at paragraph 7.14, reference {K/204/8} to page 9. The relevant text is based upon Lord Justice Potter's judgment in the Court of Appeal in the Lloyds TSB v General Insurance case and Lord Justice Potter was

himself citing Lord Sumner's speech in Becker Gray at {J/42/12}, and we looked at that passage on Thursday. MacGillivray is at one with the Insurance Disputes book on this point at paragraph 21-004, reference {K/203/4}.

Both Insurance Disputes and MacGillivray confirm that clear words are required to displace the requirement of proximate causation.

Our starting point is that the word "following", even if it were to be construed in isolation, would not displace the requirement for proximate causation, but your Lordships don't need to consider the word in isolation, because the extension includes two special conditions which confirm beyond scope for a sensible dispute that "following" should indeed be construed as requiring proximate causation.

First, special condition or additional definition number 2 and if we could see that, please, on the screen, it is at page 52 -- sorry, it is not. It is page 39. {B/19/39}. This is the provision to which Mr Edelman didn't refer on Wednesday, despite it being cited in our written submissions. That clause, we say, confirms that the extension requires that the results of the business must be affected, and I quote, "in consequence of" the occurrence of notifiable disease within 25 miles of the premises. And the words "in

consequence of" have long been recognised as indicating a requirement for proximate causation; and we refer you to MacGillivray.

MR JUSTICE BUTCHER: Sorry, could you just point out, Mr Turner, the precise words?

MR TURNER: "For the purposes of this clause:

"Indemnity period shall mean the period during which the results of the business shall be affected in consequence of the occurrence discovery or accident ..."

The words "in consequence of" have long been recognised as indicating a requirement for proximate causation, and I would refer you to MacGillivray again at paragraph 21-004.

Second, the fourth special condition or additional definition, which is the clause that Mr Edelman did refer you to on Wednesday, confirms that the extension provides an indemnity only for loss arising at those premises directly affected by the occurrence.

The use of the words "directly affected" make clear, again we say beyond scope for dispute, that indirect effects of the occurrence are not encompassed within the extension. Again, it is only consistent with a requirement for proximate causation.

If one were to take the example at paragraph 219 of the third and fifth defendants' skeleton argument, that

is {I/12/114}, that provides a rather meatier example of the distinction encompassed within special definition or additional definition 4, in operation than the example given by Mr Edelman of cleaners. And we say that that is consistent with a requirement that the losses of the insured should be proximately caused by the peril and therefore the "following" is to be construed in that way.

The FCA for its part, in its oral submission, submitted in terms that the word "following" recognised that the notifiable disease peril would not be having a direct effect of its own on the business. That was {Day3/72:10} to 14, and we say that submission is very obviously flawed.

First, it simply ignores additional definition 2 and the light which it sheds on the meaning to be given to the word "following" in the insuring clause.

Second, even indirect impacts require "but for" causation, and we can take that from paragraph 18 of Lord Phillips' judgment in the Blackburn Rovers case, {K/119/6}.

Not only does the FCA ignore such basic principles, it also, and we blatantly, ignores the language used in special condition 4 which makes plain that indirect impacts are not within scope.

If it is necessary to go further then, assuming you are with me as to the relevance of quantification machinery, one can also look to that as being consistent with our analysis of the requirement for proximate causation.

LORD JUSTICE FLAUX: Just remind us which paragraph of Lord Phillips?

MR TURNER: It is paragraph 18, my Lord.

LORD JUSTICE FLAUX: Yes.

MR TURNER: Could I turn now to the proper construction and effect of general exclusion L.

LORD JUSTICE FLAUX: Yes.

MR TURNER: The starting point is that all policy terms are expressly subject to the general exclusions. General exclusion L expressly applies to all sections of the policy, with the exception of the employers and public liability covers. As a matter of principle, the court should seek to construe the policy in such a way as would give all clauses effect. We set that out in paragraph 29 of the joint skeleton argument on construction. I/52/12. If we can see that, please.

Sorry, it is tab 5 I think. {I/5/12}. If we go to the next page, please, {I/5/13}, could I ask you just to read the quotation within that page, with particular emphasis on what Lord Goff of Chievely said in the

Hong Kong case.

Questions of repugnancy would only come into play if and only if it is not possible to fashion a construction of a relevant provision in such a way that they can live alongside each other, but even then the ability of the court simply to strike through exclusions would be limited, as Lord Justice Longmore's decision in Great North-Eastern Railways exemplifies; paragraph 31 of that decision, {K/96/7}.

My Lords, it is no accident, we say, that the FCA's oral submissions started and focused on the presence of the word "disease" within the exclusion in subclause (a). That is because the FCA, instead of heeding what Lord Goff said in the Hong Kong case, seeks to persuade you to conclude that there is an irreconcilable inconsistency between the disease extension and the exclusion for epidemic.

If one takes the example of the localised bread and butter outbreak of a notifiable disease, which was raised on the first day of the trial by my Lord Lord Justice Flaux, it is perfectly possible to give effect both to the disease extension and also to an extension for epidemic. Even though, as the FCA effectively and rightly recognises in paragraph 973 of its skeleton, the COVID pandemic amounts to an epidemic.

The reference is {I/1/309}, we don't need to turn that up.

The FCA's next tactic, having set out to construe the provisions in a way which is designed to magnify inconsistency rather than resolve it, the next tactic is to seek to persuade you that the words "pollution and/or contamination" in subclause (a) bis, so the second subclause at (a), should be construed as having been intended to be a reflection of the title to this clause, {Day3/75:3} to line 6.

Leaving to one side the almost impenetrable opacity of subclause (a) bis, there are three obvious reasons why the FCA's submissions should be rejected.

First, if the parties had intended to refer back to the title of the clause so as to provide a guide for its interpretation, they would as a minimum have used the words in the same order as they appear in the title of the clause. They did not.

Second, the fact that the words "pollution and/or contamination" are in bold capitalised in (a) bis is not something on which it is possible to place the slightest weight. As we explain in paragraph 24, subparagraph (b) of appendix 3 of our skeleton argument, reference {I/18/61}, the words "pollution and contamination" appear in a number of places in the wording, emboldened

and capitalised or unemboldened and uncapitalised, seemingly at random.

Third and fundamentally, the parties have expressly agreed that the heading is for reference only and cannot be considered to determine the meaning of the policy. Accordingly, we say that subclause (a) bis only applies to pollution and contamination, small "p" and small "c" because neither is a defined term within the policy. Even if it had been potentially capable of applying to a disease, the peril not excluded would be "disease not amounting to an epidemic". The subclause provides no assistance to the FCA.

In its oral submissions the FCA sought for the first time to shore up its position by reference to subclause (b) bis. You are certainly entitled to place at least forensic weight on the FCA's failure to draw attention to that subclause at any earlier stage, just as Mr Justice Morison did when confronted with a late developed argument of contractual construction in Eagle Star v Cresswell at paragraph 18, reference {K/115/10}

If we go back, please, to the wording of the exclusion. It is on the screen, so {B/19/93}. It is very difficult to divine the purpose of subclause (b) bis. Its language is ordinarily to be found as a saving

or for the avoidance of doubt provision at the end of a policy endorsement, and it does not sit naturally as a component of an exclusion clause. Certainly it cannot and should not be construed in such a way as to defeat the very exclusions which have just been spelt out in the first subclause (a). If it makes any sense at all, we submit that it can only be as a limitation upon whatever carve out is made in subclause (a) bis.

LORD JUSTICE FLAUX: The last bit of it, and especially "the exclusion shall not be superseded by this clause" is really saying no more, isn't it, than to the extent there is a specific exclusion elsewhere in the policy in relation to what would otherwise be an insured peril, say, that this general exclusion doesn't supersede it, so it doesn't cut down the scope of any specific exclusion. Whether there is anything of that kind is obviously a different question, but as to what the purpose of the provision is, that seems to be at least a purpose, none of which, you would say, assists the FCA.

MR TURNER: We would say if that is the purpose it doesn't assist the FCA. We would proffer an alternative, which is that (b) bis is actually only referring to (a) bis, and then it makes sense. Quite what it adds is open to debate.

LORD JUSTICE FLAUX: Yes.
MR TURNER: If one steps back, we say that you should give effect to general exclusion L.
LORD JUSTICE FLAUX: We are spending a lot of time on this provision, and you only rely on it because you say it indicates an exclusion of epidemics.
MR TURNER: Correct.
LORD JUSTICE FLAUX: So you use it, in a sense, to shore up your primary argument on the notifiable disease provision, which is the relevant insuring clause.
MR TURNER: Yes, but it could go wider because it could be engaged by a Leicester scenario.
LORD JUSTICE FLAUX: I see what you mean. Yes, okay.
MR TURNER: My Lord, you have my submissions. I am going to move on to RSA4. {B/20/1}
Our submissions in relation to RSA4, we don't need to turn them up, are {I/18/70} and following. Appendix 4 to our written submissions.
If we go to page 2 under the heading "Underwritten by RSA", you will see a one contract provision. If we jump forward, please, to page {B/20/51} which is in the sample schedule, there is cover for any one single business interruption loss, on page {B/20/51} and that term, "Single Business Interruption Loss" is defined at page {B/20/33}, and we are in definition 105,

sub-definition (i):
"With all business interruption loss ... and amounts payable under extensions that arise from, are attributable to or are in connection with a single occurrence ..."
"Covered Events" in the definitions, page {B/20/23}. In the right-hand column, definition number 17 means the events, small "e", as described featuring in a number of insuring clauses including, so far as is relevant, clause 2.3.
Just pausing there, we say that this is a policy which provides insurance against events, not states of affairs. We say that the COVID-19 pandemic is not an event in the ordinary usage of the term. Mr Edey said that the attempt to cross-refer to the aggregation cases, that is particularly to AXA v Field, doesn't hold water; the reference for his submission is {Day3/185:22} and following, but he didn't explain why. Neither aggregation nor the policy in this case require any special meaning to be applied to the word "event" and, as Lord Mustill observed in AXA v Field, page 1035 G {J/74/10}, the construction of the word "event" is a question of ordinary speech, and that is a construction which leads to it being something that happens at a particular time at a particular place in

a particular way. It is not a cause, and it cannot be a continuing state of affairs.
Can we go to page 7 of the policy then, {B/20/7}. "Business Interruption", the insuring clause 2.3, "Specified Causes":
"In the event of interruption or interference to the insured's business as a result of ..."
Then (viii):
"Notifiable Diseases and Other Incidents."
That is a defined term that we will come to in a moment. And criterion (d) is:
"occurring within the vicinity [defined term] of an insured location
"during the period of insurance."
Then (xii) is "Prevention of Access - Non-Damage", again a defined term, with a time deductible of eight consecutive hours.
We divide, for reasons that will become apparent, the clause 8 perils into two. So there is a notifiable disease peril and another incidents peril, and we will look at those in a moment.
Business interruption loss definitions, you were shown by Mr Edelman page 32 of the policy -- sorry, page {B/20/23} of the policy has the definition of "Business Interruption Loss", which includes the

reduction in turnover. Page {B/20/32} defines "Reduction in Turnover" as the amount by which the turnover falls short of the standard turnover. "Standard Turnover" is defined on the next page, page {B/20/34}, and requires adjustments to be made to take into account variations affecting the insured's business either before or after the covered event, or which would have affected the insured's business had the covered event not occurred, so that the figures thus adjusted will represent as nearly as may be reasonably practicable the results which but for the covered event would have been obtained during the indemnity period.
So it invites and requires the application of a counterfactual for the purposes of quantifying loss. We say that is to be given its natural meaning, not the convoluted meaning advanced by the FCA.
Before we move on to the definitions of the perils, could we look at the definition of "Vicinity", page {B/20/35}, common, it appears, in all of the perils with which you are concerned:
"... an area surrounding or adjacent to an insured location in which events that occur within such area would be reasonably expected to have an impact on an insured or the insured's business."
We say that that is a term which is plainly intended

to act as a limiting factor for the purposes of the insured perils. We say its meaning is to be divined at the date of inception of the policies, it is prospective. And there is a single --

LORD JUSTICE FLAUX: You would say that the FCA's interpretation of this "Vicinity" definition focuses on the words "within such area would be reasonably expected to have an impact", and hence Mr Edelman's submits: well, that would encompass the entire country. But that really ignores the opening words, which is "an surrounding or adjacent to the insured location".

MR TURNER: It ignores lots of things, my Lord. It ignores "surrounding or adjacent to". It treats "events" as if it is referring to the specific insured event which has occurred, rather than engaging in a prospective exercise. And in so doing it puts a bright red line straight through "might reasonably be expected".

MR JUSTICE BUTCHER: It also ignores the meaning of the word "vicinity" and I seem to remember Lord Hoffmann had said that even if it is a defined term, the term which the parties are defining is itself an indication of what they may mean.

MR TURNER: Your Lordship is quite right. You have in mind the Birmingham City Council case {K/129/5}.

Sorry, could I ask my Lord Lord Justice Flaux to

mute?

LORD JUSTICE FLAUX: Yes. Sorry.

MR TURNER: If we go to {K/129/5}, and it is paragraph 11. It is just by side letter F:

"Although successor is a defined expression ..."

My Lords, we deal with this submission in detail in paragraphs 26 to 32 of appendix 4 {I/18/10} and following. I am not going to repeat those submissions, it is obvious that you already have them well in mind.

The oral submissions made by the hospitality interveners, in fact if we start with their written submissions at paragraph 86, {I/2/22}.

You start with what has happened and then you work back. If you do that, it is no surprise that when you ask the question what area has been impacted, you get the answer: the whole of the UK. But that is not the question that is posed by the definition. If we look at what they said in their oral submissions, Day 3, page 182, lines 15 to 24 {Day3/182:15}:

"... can only sensibly be a reference to whatever event has in fact occurred, in respect of which the insured seeks to establish cover."

That is not an attempt to give effect to the policy definition, it is an attempt to subvert it, to rewrite it and to remove the vicinity requirement from the

policy.

As to whether what has happened could reasonably have been expected, your Lordships need go no further than Mr Edelman did at {Day2/118:18} to line 21:

"Insurers would have hoped and expected ..." that nothing as serious and as dramatic as what has happened to the country this year.

Well, quite how the FCA or the hospitality interveners can say that what has happened could reasonably have been expected, which is a test which imposes a high degree of prospective probability, is as yet unexplained.

Moving on from vicinity, could we go back to B/20 and look at the notifiable diseases peril.

Sorry, could we go to page {B/20/7} to start with to remind ourselves what the introductory words are. So it has to be, under 2.3(viii), interruption as a result of notifiable disease occurring within the vicinity of an insured location. The definition of "Notifiable Diseases" is at page 29 {B/20/29}. Notifiable diseases means -- in fact we have in fact three definitions of "Notifiable Diseases" in (i), (ii) and (iii). So it is specified diseases in (i); then any additional disease notifiable under the regulations, with a deeming provision that it was notifiable from its

initial outbreak once it has been made notifiable, and the notifiable disease has to occur within the vicinity of the insured location.

We say that the causal link, the mandatory causal link between the occurrence of the notifiable disease within the vicinity of the premises and the interruption or interference is established by using the words "as a result of" within the insuring provision.

You already have my submissions in relation to proximity requirements in general, and notifiable diseases in general, so I am not going to repeat them in the context of the notifiable diseases peril within RSA4.

If we then look at the "Other Incidents" definition within paragraph 69, and that is at (v) {B/20/29}:

"Defective sanitation or any other enforced closure of an insured location by any government authority or agency or a competent local authority for health reasons or concerns."

So that would be an other incident which again has to occur within the vicinity of the insured premises. One goes back to the insuring clause.

In short order, first, only closure under legal compulsion will suffice. The word "enforced" has to be bringing meaning to a clause, so there has to be

a closure which either is or is legally capable of being enforced in order to have enforced closure.

Premises which were allowed to continue trading cannot bring themselves within this peril.

Premises which were prohibited from trading can bring themselves within the peril, but only from the date on which the relevant closure requirement took effect under the regulations.

There has to be a causal link between the enforced closure and the loss, that is made clear from the standard turnover definition. And the health reasons or concerns which are the cause of the closure have to be specific to the vicinity of the premises. That is not to say they can't be wider in geographic scope, but the health reasons or concerns within the vicinity of the premises have to be the cause of the enforced closure. The word "for" should be construed as meaning "because of".

MR JUSTICE BUTCHER: Just remind me what categories of insureds have RSA4. It is wholesalers but --

MR TURNER: We have manufacturers, we have private health companies. There is a very wide variety, both in terms of categories of business and also size of business. There are obviously hospitality industry insureds, because there are interveners who come from the

hospitality industry. None of the interveners is actually an RSA insured. But this is a general combined commercial policy which covers a wide variety of different insureds. So hospitality industry, wholesalers, manufacturers, retailers, it is a very broad spectrum, my Lord.

I can then go on to the "Prevention of Access" definition. Again, if we can go back to page 7 just to set the context.

My Lord, I can feel Mr Gaisman's breath hot on my neck.

{B/20/7}, so interruption or interference to the insured's business as a result of prevention sense of access - non-damage.

Then go forward to page 30 for the relevant definition, please {B/20/30}, item 87. I ask you to note the examples given in (i) and (iii), and then (ii) is:

"The actions or advice of the police or other law enforcement agency, military authority, governmental authority or agency in the vicinity of the insured locations ..." which prevent or hinder the use of access to insured locations during the period of insurance.

My Lord, there is a lower inner limit on this peril than the other two. If one were to look at the sample

schedule, the reference is {B/20/51}, for the notifiable disease and other incidents perils the inner limit on the sample schedule is 2.5 million, for the prevention of access on damage it is 500,000, and obviously there may be variations between different insureds on those figures.

We say that this peril is to be construed in a way that actions outside the vicinity of the insured locations and actions which do not prevent or hinder the use of or access to the insured locations are simply not within the scope of the peril insured.

Again, tying it back to the definition of "Covered Events" and the use of the word "events", small "e", within that definition, because the actions of the police, et cetera, have to be an event, they have to be actions at a particular time, a particular place. In short, they do have to be specific to the vicinity, even if they could have an effect which goes beyond the vicinity. But for causal purposes one focuses on whether the causing a relationship between the vicinity and the relevant actions is established, rather than looking at something wider ranging.

Social distancing measures, we say, do not come into play. Can I give you an example of that. Let's take the example of a small hotel with a booking for a coach

party of 20 people. Just as the coach is about to turn into the hotel it is intercepted by the police, who are waiting for it and its occupants, and the party is arrested and they spend the next 24 hours in custody under investigation.

On the FCA's case, the actions of the police, which were undoubtedly in the vicinity of the hotel, have hindered access to the premises and the hotel can recover for the ensuing interference with its business. We say that is a nonsensical result and cannot have been intended. And the reason why the hotel cannot recover for prevention or hindrance of access in those circumstances is because the actions of the police were directed towards the individuals, rather than the premises. They are not within the scope of the peril; the access to the premises is neither hindered not prevented.

My Lords, the FCA gives a café example in paragraph 588 of its submissions {I/1/204}. Paragraph 588:

"Take for example [in line 2] a café located in the suburbs of a city ..."

We say that that again repeats the FCA's error of reducing the proximity requirement to a question of ticking a box rather than treating it as an integral

part of the insured peril.

My Lord, the complaint is made by the FCA that we give no meaning to the part of the clause which reads, in the "Vicinity" definition, "in which events that occur in such an area will be reasonably expected to have an impact".

That complaint was made on {Day3/183:13} to line 25. I think in fact it was Mr Edey for the hospitality interveners.

In response to the charge that we are giving no meaning or content to the definition of "Vicinity" we say simply this: it means what it says. Its application is going to be fact-sensitive for any given location. Hence, we are reluctant to try to produce a one size fits all definition or meaning. We can give you an example; an obvious example would be where you have an insured location on an industrial estate with a single route of access or egress. Plainly anything which happens on that single route of access or egress is likely to have an impact upon the insured premises.

In relation to overlapping cover -- this is the final point in relation to RSA4, and again this was raised by the hospitality interveners -- were you to find that there are overlapping perils in play which are engaged, then we accept that for the purposes of the

adjustments provisions within the policy those perils cannot be played off against each other to cancel each other out.

My Lords, those are my submissions in relation to RSA4, and those are my submissions unless I can assist you any further.

LORD JUSTICE FLAUX: No, I don't have any questions. Thank you very much, Mr Turner.

MR TURNER: Thank you.

LORD JUSTICE FLAUX: Right, is it now Mr Gaisman?

MR GAISMAN: It is, if your Lordships can hear me.

LORD JUSTICE FLAUX: We can hear you, Mr Gaisman. All I was going to say was, given that it is nearly 10 past 11 would it be sensible to take the break now and then you will get a clean run at, let's say, 20 past 11?

MR GAISMAN: I am in your Lordship's hands. I have some introductory remarks which would take me a little longer, it would take me to 11.30 or slightly beyond. I am in your Lordship's hands.

LORD JUSTICE FLAUX: I think it would be sensible if we broke now and we will say 20 past. My clock says 11.08, so if we say just before 20 past. All right?

(11.08 am)

(Short break)

(11.20 am)

LORD JUSTICE FLAUX: If you are ready, Mr Gaisman.

MR GAISMAN: Yes, my Lord. Can your Lordships see and hear me?

LORD JUSTICE FLAUX: Yes.

Submissions by MR GAISMAN

MR GAISMAN: My Lords, in the Hiscox wordings there are two clauses which have been invoked by insureds, the NDDA clause and the public authority clause. Typical examples are in the Hiscox 1 lead wording. We asked for your Lordships to be supplied with a physical bundle of Hiscox wordings, which I hope is convenient. The reproduction on the screen is taxing when the print is small.

My Lords, if we may start with the public authority clause and establish the taxonomy. Like the joint skeleton on causation, paragraph 63, the components of the public authority clause may be stated in their correct causal sequence as A an occurrence of a disease, a notifiable disease, followed in a causal sense by B, the restrictions imposed by public authority, causing C, the insured's inability to use the insured premises, causing D, an interruption which must be the sole and direct cause of loss.

Your Lordship will knows that the page references are in 42 and 42 in the bundle behind divider 6.

We need to analyse these clauses and the stem from which they branch without any presumption that they offer cover in respect of pandemics or that they should. We need to approach them without hindsight as to the extraordinary events which we have all experienced this year. Thus, in deciding whether the parties intended prospectively, and without knowledge of those extraordinary events, to apply the usual rules of insurance law to their contract so that only loss that would not have occurred but for the insured peril is recoverable, or whether they must be taken to have intended to abrogate them or even modify them, we should not test that with the knowledge of the present situation, as opposed to the simpler sort of case that was clearly the paradigm. That is to misuse hindsight.

We also need to be aware that when the FCA invokes what the parties must have meant, the intention or at least the effect of that phrase is often to camouflage those points in its argument where there is nothing but bare assertion. Testing the operation of clauses on the basis that it cannot have been intended X or Y because that wouldn't provide cover in the present situation, is also to beg the question.

So I intend, in a necessary corrective to the FCA's submissions, to start as it were in a neutral frame of

mind and focus on the language of the wordings as reasonably perceived at the date of the contract.

Now, a number of discrete points, some of them in a sense overlapping, on the two clauses arise.

If Hiscox succeeds in demonstrating that neither clause applies to the present facts, there will be no cover. That, obviously, is its primary aim in making these submissions.

Now suppose, however, that Hiscox falls short of that aim. It might then be thought that the greater the number of points on which Hiscox is held to be right and the narrower the ambit of the insured perils which are held to operate, the more confined the indemnity is likely to be. Because the narrower the ambit in my taxonomy of B, C and D, the smaller the loss that is likely to flow from their successive effects, which is what this insurance is against.

Your Lordships will already have appreciated that it is a remarkable feature of the FCA's submissions on causation that unless Hiscox has a complete win on coverage, it may as well not bother making submissions on many aspects of coverage. Because on the FCA's case, even if Hiscox is right on many of those submissions, it won't do it any good. Once A is shown to cause B, C and D, Hiscox, according to the FCA, is liable for all the

consequences of A, irrespective of how narrow B, C and D are shown to be, and how little loss is caused by those factors in combination.

That is a sure sign, one of many, that the FCA's approach cannot be right. Indeed, it is not right.

First, the FCA seeks to characterise, as your by now Lordships well know, and I am not going to reinvent the wheel, seeks to characterise everything that happened as one indivisible peril; the disease itself, the economic and social consequences, the whole of the government reaction and all the losses. But nowhere have the FCA sought to explain why this extreme abrogation of separate facts in different categories is an appropriate standpoint. It is simply a metaphyseal assumption, an unexamined first premise which is never justified. But it is wrong. I won't go over the effective demonstration that Mr Kealey conducted on Day 4 of the way in which the FCA summarises the true cause of everything in its skeleton and Mr Kealey demonstrated that that summary bears no recognisable relationship to any insured peril in any Hiscox wording.

Secondly, we all know that how a court should properly characterise a set of circumstances depends on the purpose for which the characterisation is being made. That is Lord Hoffmann in the Environment Agency

case and your Lordships have it well in mind.

The only legitimate perspective here is to characterise the facts in light of the ambit of the perils which the parties agreed were to be insured and matters which on the true construction of the wordings, the parties agreed were not insured. The distinction between these two categories of thing has, we respectfully submit, to be reflected and carried through in the court's treatment of the facts and the indemnity, because otherwise it is rewriting the parties' bargain.

It cannot be right to recast the bargain on the basis of an assertion, which is all that it is, that everything is inextricably interlinked. This is because the contract, read as typically applying to fact situations where, as I will submit, no undue difficulty will arise, read against the background of the general law, read against the contract provisions, including the trends clauses, requires the court to distinguish between different things, to recognise that certain conditions have to be satisfied, so that it is only loss caused by the effect of and in combination which is insured.

I shall return to this point if I have time later. Cases of truly indivisible loss are few and far between, and the court sets its face against them.

Your Lordships will have picked up the wise words of Lord Justice Laws in the Area Rose(?) case, which I shall come back to. Only if there is no rational basis does the court throw its hands in the air and say: well, this is a case where people were reading four newspapers at breakfast and who is to tell which newspaper, all of which contain the same libel, caused the damage.

Now --

LORD JUSTICE FLAUX: It is a classic example of the two people who shoot at somebody at the same time and you can't say who actually caused the death.

MR GAISMAN: That is -- yes, although that fact pattern, that example normally arise in a different context but your Lordship is right.

Can I just develop the point, though. Intrinsic to the whole of the FCA's approach is the assumption that any construction or attitude to legal principle other than its own places an intolerable burden on the assured in proving its loss.

Well, at the outset I want to put down a challenge to that entire assumption. Why, in the ordinary case of the operation of these clauses, which is all that the parties can be taken prospectively to have contemplated, why would this be so, typically? A person commits

suicide in a flat above a shop and the building is closed. Loss is suffered. Why would anyone suppose that but for the public authority action any customer of the shop would even have known about it? The obvious assumption in the counterfactual there is that the loss would not have been suffered anyway, and so the insured recovers.

When your Lordships go out to dinner in a restaurant, perhaps instead of a cancelled trip to the opera, you usually do not know if a previous customer has sustained food poisoning at it. But supposing that person conscientiously complains to the authorities and the restaurant is shut down, the assumption in the counterfactual again is that the loss would not have been suffered anyway and there is no obstacle to the insured making a full recovery.

Conversely, in my Lord Mr Justice Butcher's comment on the lorry spill case, on {Day1/118:1} of the transcript, it may be that all the loss was caused by the spill, albeit that the public authority reaction ensued from it. Or to take a case of a problem with drains, if a restaurant filled with effluent and later is closed down, in circumstances where it is obvious that open or closed no one would have gone to it, why should the insurer not be entitled to say: the public

authority action didn't cause you any loss?

Now, there may be more difficult cases, but then you get the loss adjustors in. There is not the slightest evidence in this case, from any loss adjuster, that they would be defeated in a paradigm case or indeed in this sort of case, and there is no reason to think that they would be. The big leap in the FCA's case is to ascribe to the parties a unique, legally startling and unequivocal prospective intention to abdicate any attempt to work out what loss was caused by the insured peril and what loss would have occurred anyway, on the basis that they must have assumed in advance that the problem of quantification of loss would be so difficult, in a business interruption insurance of all things, that the normal rules governing the measure of indemnity should be discarded.

There is nothing unusual about difficult questions of quantification in business interruption insurance, as the trends clauses expressly contemplate. I do want to submit that there is simply no basis in the evidence, there is no basis in the law and there is no basis in the contract, in other words, there is no basis anywhere, for this radical assertion.

Now if I could inflict a metaphor on your Lordships, always a dubious exercise, the position is simply this.

Imagine that the pandemic is a large bore pipeline through which liquid flows. The liquid is the loss which the pandemic causes people, businesses. We will call that pipeline A. At a certain point in the pipeline there is a flange at which several smaller bore pipelines lead off the main pipeline, each of them taking a small proportion of the liquid flowing through pipeline A. One of them, one of those smaller pipelines, is called public authority action, and we will call it pipeline B. In due course it leads to pipeline C and to pipeline D but we will leave those out of the equation for simplicity. Let us assume that pipeline B receives 25% of the total liquid. Other pipelines, which we will call X, Y and Z, take the other 75% of the liquid from A.

The insurance here is against the loss caused by public authority action following or caused by -- we will come back to that -- among other things an occurrence of disease. It therefore only insures against the loss coming out of pipeline B.

As Mr Kealey explained on {Day4/51} to 53, and 60, we are not leaving A in the counterfactual and only reversing B, C and D. A is the reason why there is any liquid coming through at all. We reverse A to the extent that A supplied liquid to B:

Now, given that Mr Kealey dealt with this all on Thursday, and I will come back to causation if I have time at the logical place in my submissions, and I want to get on to the Hiscox wordings themselves, I just want to make I think three or perhaps four points by way of supplement on this.

First, of course counterfactuals are relevant to the general causation question, the "but for" the insured peril. In addition to the points that my learned friend Mr Kealey made on Thursday, may I remind your Lordships that on {Day1/92:1} the FCA's counsel said this:

"The court is not being asked to disapply, rule on or modify the rules of proximate or 'but for' causation as they apply to the law of obligations. What it is being asked to do is to rule on their application within the confines of specific BI insurance policies."

That statement appears to us to acknowledge that the "but for" test has to be applied and satisfied. We are not all wrong about this. In the Hiscox case, as your Lordship will see from page 44 of the bundle which your Lordships have open, the loss of income clause expressly, as it were, leaves the counterfactual hanging, but inevitably so. So on page 44, a third of the way down, loss of income, the amount we will pay to for each item, "The difference between your actual

income during the indemnity period and the income it is estimated you would have earned during that period ..."

And the court has to supply the ...

My Lord, can I make a second point which is to do with reversing out the counterfactuals. This is an additional point to Mr Kealey's. The debate as presented by the FCA is between extreme alternatives. The FCA says that one is one must reverse out the disease altogether, and the FCA accuses the insurers of failing to reverse it at all. But as I have said, it is not -- I only speak for Hiscox, unlike Mr Kealey on Thursday -- it doesn't matter how often this is said by the FCA, it is still not true. It is not Hiscox's case that we are failing to reverse out the disease. We are not cherry-picking. We are not ignoring the dominoes, to use my learned friend Ms Mulcahy's metaphor, because she made the same charge as Mr Edelman did and it is no better founded. Indeed, and I know there was a lot to read, but we did make this all pretty clear in our skeleton that we are reversing out the disease, but only insofar as the disease causes the public authority action, et cetera.

You will find that in paragraph 365 of our skeleton, and it has not been answered, it has just been ignored so far. All of this is orthodox causation reasoning,

reversing the insured peril, properly described, and its consequences. There is no magical difference between BI covers with complex triggers and any other insurance.

The third point I want to make is this: your Lordships are well aware, this is as to the extent to which it is the FCA that is tearing up the rule book on causation, that it extends its case to saying that the indemnity should extend to covering a loss of turnover even before the insured peril has operated, the approaching hurricane and so forth.

Your Lordships expressed a little scepticism about this. My point is that this isn't really a severable the part of my learned friend's analysis. As usual, it is justified on the basis of the parties' intentions, which begs the question, and because, so the FCA says, it is ridiculous to sever the approaching hurricane from the actual hurricane, it is all inextricably interlinked.

My Lords, this chain of unsupported assertions is not just wrong, it is the 13th chime on the FCA's whole causation edifice. Why should insurers pay for more than the loss caused by A that comes out of the end of pipeline B.? That is what they have agreed to pay. And although the FCA denies, in the passage that I read to your Lordships from my learned friend Mr Edelman's

submissions on Day 1, although it apparently denies that it is disapplying or even modifying the rules, your Lordships are actually being invited to voyage to a very strange place indeed.

Now, my Lords, I hesitate to make the next point, it is so obvious. English judges decide the cases before them on the basis of principle, and that makes our law predictable, coherent and certain; it consists of an objective and principled set of rules. Those advantages, on which your Lordships do not need a homily from me, become clearer still on the rare occasions when the judges, no doubt for good and sufficient reason in one sense, abandon those rules.

Now, my learned friend Mr Edelman does not dwell on the Fairchild Enclave and we are not surprised. But the truth is it is a cautionary tail, that decision and its progeny, and I just ask your Lordships to bear in mind something that Lord Sumption said in IEG v Zurich, at paragraph 114, I don't think we need to look it up, where he talked about how, as a result of the original Fairchild decision, the law had moved from each one of expedient to the next, generating knock-on consequences which we are not in the position to predict or take into account.

I do submit, my Lord, if I am permitted to do so,

that the abandonment of principle by one court can create untold problems for future courts, and that in our commercial law above all is a course to be avoided.

LORD JUSTICE FLAUX: That was demonstrated in the context of the Fairchild Enclave by the dispute which I had to arbitrate in MMI v Equitas, which as I understand it is Not going to the Supreme Court because it settled, but was due to go to the Supreme Court, no doubt where they might have had something to say about the Fairchild Enclave and the mess it has got us into.

MR GAISMAN: Lord Justice Males had already said something about it, my Lord.

LORD JUSTICE FLAUX: Yes, he certainly did.

MR GAISMAN: Effectively it was, "Come on chaps, the party is over", if I can put it this way without disrespect.

I have said enough on this. Can I come back to the two Hiscox clauses. To save time I am going to deal with certain points which are common to both first, your Lordships have them well in mind, and your Lordships have I hope has read our skeleton and seen how the points go logically under each clause.

Now can I first say something about the FCA's approach. We complained in our skeleton, and this is not really my point but I do make the complaint, about the atomistic approach to the isolation of certain words

and the failure to construe them in context. I don't need to say any more about that. But there is something authority problematical in that, and I recognise the burden that the FCA is under in this case but the process of taking words from individual insurers' policies, grouping them together, submitting that they must all mean the same thing, it's very difficult. And your Lordships have got dozens of wordings, it is very difficult to keep one's eye on the ball. And I don't want to be solipsistic by saying it is Hiscox wordings and nobody else's that for the moment I am inviting your Lordships to look at.

LORD JUSTICE FLAUX: That was precisely the reason why at the second case management conference we refused Mr Turner's application to adduce evidence of yet more wordings which weren't before the court, because we are not assisted by, as it were, cross- fertilisation of wordings. That is not an appropriate way of construing contracts at all.

MR GAISMAN: No, but my point is -- I respectfully adopt what your Lordship says. My point at the moment is a slightly different one, which is that this omnium gatherum approach has a particular defect so far as Hiscox is concerned. It tends to draw attention away from the very specific nature of the events which have

to be present as what you might call initial triggers, or initial elements of the trigger, under are both of these clauses and, in some sense at least, to cause the ensuing action. Those are the first two elements under both clauses that the FCA needs to establish.

Now, just for example, when we look -- and I am not asking your Lordships yet to turn it up -- at the particulars of claim paragraph 43, rather to our surprise we see that the same facts are pleaded as both an incident, which is a rather small sounding word, and an emergency, which is a rather large sounding word.

Now, my clients' policies don't insure against emergencies. I would like, as I say, to focus on -- this where is I am going next -- the qualifying conditions for cover and the true cause of the government action in March.

To trigger one or other of the Hiscox clauses the FCA must show, I hope your Lordships have pages 41 and 42 open which will do, they must show an incident or an occurrence of a notifiable disease, to paraphrase. If the FCA cannot show that, the claims against Hiscox will fail at the outset.

Furthermore, it is inevitably common ground that as regards the NDDA clause the incident must be a local one, within a 1 mile radius, or occasionally the

vicinity. The Hiscox 4 wordings also have an express 1 mile radius in the public authority occurrence clause.

Moreover, and as is common ground and admitted, there has to be a causal relationship between the incidence and the occurrence and the subsequent public authority actions.

Now, what sort of a thing in principle is an incident or an occurrence? As my Lord Lord Justice Flaux rightly stressed at the outset of the FCA's submissions on this clause, an occurrence, not lots of occurrences but an occurrence, {Day2/130:2} to 5, and indeed also an incident.

In a case too well-known to require citation but I seem to be citing it, Lord Mustill in AXA v Field, in relation to an event, said that it was something that happens at a particular time, at a particular place, in a particular way. And the same is true of an incident or an occurrence. The FCA's skeleton at footnote 329 on page 133 equates the three terms. That is also the ordinary way in which we use these words.

Now, the fact that AXA was a reinsurance case and the issue there was one of aggregation is neither here nor there. Lord Mustill's dictum has been applied more widely in the insurance context, for example in Zurich Insurance v Maccaferri {J/136/1} where the notice

clause in a product liability policy required that the insured give notice in writing as soon as possible after the occurrence of any event likely to give rise to a claim.

It was common ground between counsel that Lord Mustill's definition of "event" was apt, and counsel included my learned friend Mr Edelman.

Now the words "incident" and "occurrence", an incident, an occurrence, could not be more different from abstract, potentially widespread words like "danger" or "emergency".

These words, "incident" and "occurrence", are particular, concrete, confined. Read without hindsight, nobody could seriously argue or would seriously argue that they applied to a national or an international state of affairs.

Now, the FCA's case is that whatever it was that triggered these clauses was an incident or an occurrence. "Occurrence" is pleaded in paragraph 38 of the particulars of claim, and "incident" is pleaded in paragraph 43 of the particulars of claim.

The funny thing is that the FCA's primary case on the meaning of these words, and how they are proved, is put in two completely different ways, which is odd, because since they are similar words you would think

that the FCA would address them in similar ways. But the FCA cannot make up its mind.

As regards the public authority clause, which requires an occurrence, the FCA adopts a granular approach. It says that an occurrence happened -- this is paragraph 38 -- as soon as COVID became a notifiable disease, and that was on 5 March, which was also the date upon which the first COVID death was reported, as paragraph 18.7 of the particulars of claim reminds us. In other words, it doesn't matter if there was only one case or how many cases there were or, in a sense, how few there were, the individual cases of the disease were the occurrence, once it was notifiable as required by the public authority clause.

When it comes to "incident", an incident, which is what is required by the NDDA clause, however, the FCA turns the telescope round and looks through the opposite end. Instead of focusing on the individual case, the FCA adopts the most soaring of birds' eye views. The "incident", which one might have thought was a rather specific sort of word, is the nationwide emergency; that is paragraph 43.

Now, this ambivalence reflects the FCA's perennial problem, which is this: the individual local incident or granular occurrence was not the cause of the government

measures in any sense. And the true cause of the government measures, the pandemic emergency, is not an incident or an occurrence within either of the clauses. That, we say, is the bind which the FCA is in.

What do I mean by saying that it was the pandemic emergency which caused the government measures? Indeed, what was it that caused the government measures? The answer given by the FCA, and perhaps we can look at {A/2/28}, is in the particulars of claim, paragraph 43. It is the first sentence:

"The pandemic was a nationwide emergency arising out of a highly contagious disease ..."

Now that statement rightly recognises two things: first, it treats the pandemic as an emergency; and secondly, it contrasts both the pandemic and the emergency with the disease out of which the pandemic emergency is said to have arisen.

The pandemic emergency, my Lords, is not the case of the disease in Alnwick which the FCA says will trigger the cover of a businessman in Ilfracombe.

Let's assume they are right on that for the moment. A pandemic, the pandemic is not even the aggregation of the total number of cases on any date you care to choose in March. If the government had thought that was all there were ever going to be, it is most unlikely it

would have done anything. No, the pandemic emergency and the true cause of the government measures was much more than that. Crucially, it was the future. It was the government's and the scientists' fear of what was to come. It was all the future projected cases of the pandemic. Importantly, and as my learned friends reminded your Lordships on Day 1, it was the real concern that the NHS would be overwhelmed unless the measures were taken. That was mentioned several times on Day 1.

My learned friend Mr Edelman also mentioned, obviously an associated point, the fear of what he called much higher mortality if preventive measures weren't taken, {Day1/141:1} to page 142. Sources in the materials which are before your Lordships mention the figure of 500,000 deaths if preventative measures weren't taken, but I am sure your Lordships remember that anyway. In the Prime Minister's words, which we don't need to look at, it is {C/2/371}, he said in May:

"It is a fact that by adopting those measures we have prevented this country from being engulfed in what could have been a catastrophe in which the reasonable worst case scenario was half a million fatalities."

There is also in the bundle an article in The Lancet, in the agreed facts, which refers to disease

modellers whose initial forecast was that in the absence of suppressive measures COVID could have resulted in the deaths of 500,000 people in the UK, and that this had been widely credited with persuading the UK Government to reverse course and institute a strict lockdown.

Again, my learned friend Mr Edelman on {Day1/130:1} talked about government action having been driven in part by what he called apprehension.

It is all the same point. The government's reaction was not a response to any particular incident or occurrence, whether within a 1 mile radius or at all, but to a general fear of what might come, which operated on a vastly wider scale. Only that, only that could possibly have led the government to introduce what, one needs to remember, was an unprecedented abrogation of personal freedom.

Now, in the light of that one comes back to the two Hiscox clauses, which if your Lordships still have, I am sure your Lordships know them very well. Let me pose the question the other way round. Can the pandemic or the emergency, as I have explained its true nature, really be said to have been an incident within a 1 mile radius, an occurrence of the disease? Let it be assumed for the moment an occurrence of the disease anywhere. Surely the pandemic emergency was the antithesis of

something that happens at a particular time, at a particular place, in a particular way, which is Lord Mustill again.

Whatever it was --

MR JUSTICE BUTCHER: I certainly see in relation to an incident within a 1 mile radius, Mr Gaisman, you say that the words speak for themselves. But in relation to the occurrence of the disease, surely action by the public authority is always there, in a sense, concerned with the future, with the possibility of the disease spreading.

MR GAISMAN: My Lord, of course I understand that point, and if I may say so I do dispute it.

In the case where Legionnaires' disease is found in a shower, your Lordship is quite right that there is, in a sense, at the back of the public authority's mind ...

LORD JUSTICE FLAUX: We have lost you again.

MR GAISMAN: Can you hear me now?

LORD JUSTICE FLAUX: Yes.

MR GAISMAN: Of course I accept in principle my Lord Mr Justice Butcher's point, but in the case of the Legionnaires' disease, there is simply -- there is the shortest possible causal chain. The local authority receives a report, bang, it closes down. I don't dispute that, as it were, at the back of the local

authority's mind there is: well, what happens if we don't? And this is a fact-sensitive question to an extent. But what I am seeking to do is not to dispute the point that has been put to me but to seek to argue that on the facts of the present case the occurrence is not causal in any sense. Indeed, it is what in a Freudian slip the FCA calls part of the factual background; that is paragraph 60 of the particulars of claim.

So I take my Lord's point, but what I am inviting your Lordships to do is to look at what happened in this case and ask whether it can truly be said, on the facts of the present case, that the public authority's reaction -- sorry, I have got two thoughts in my mind at once. But a reasonable observer would say: well, if you have got a case of Legionnaires' disease in the showers, you are going to be closed down, mate. It is just falling off a log; it is an obvious consequence.

What happened here, my Lord, was no doubt, if one thinks of other pandemics for example, or other countries, what happened here was utterly extraordinary, and the causal chain between the occurrence and the subsequent government measures incorporated so many extraneous elements which are far beyond and outside the purview of the occurrence that we are simply in

different territory.

So that would be my answer. I am going to come back to this when I deal specifically with the public authority clause. But my overall point is that whatever it was that did cause the government measures, it was not an incident or an occurrence.

The FCA is trying to cram something which is far too big, far too amorphous, far too prospective and so much more than even the total sum of the cases of the disease at present, or give a date in March, into two clauses, both of which, not just one but both of which, and it is unsurprising that they go together, contemplate events on a wholly different scale and of a wholly different nature.

Of course I haven't forgotten that the FCA is not saying that the pandemic was the occurrence; that is paragraph 38 of the particulars of claim. But if it commits itself to a granular definition of "occurrence", which it does, it cannot credibly assert that the individual occurrence or few occurrences of the disease in any sense caused the government measures. And it is in that sense, that is why we respectfully submit Hiscox is right to say that its BI covers do not insure pandemics. It is impossible to say that the cause of the government measures, which was the pandemic

emergency, was an incident or an occurrence in the AXA v Field or in any normal sense.

If I am right or anything like that point, perhaps with the modification, if it is a modification, introduced by my Lord Mr Justice Butcher's question, the FCA's bind, as I call it, on these clauses is inescapable, and it means that the claims against Hiscox should fail.

That is that point. Can I now move on to two smaller points on the clauses taken together.

The first is this, it is a short point: these clauses and this BI cover is invariably an adjunct to property cover, as we explain in our skeleton. In fact, as my learned friend Mr Kealey explained on Day4, it is an adjunct to an adjunct, the non-damage extension to the BI extension to the property cover. Now the fact that the cover is an adjunct to property cover, I don't say it is decisive but it supports the conclusion that the two relevant clauses are objectively intended to address risks local and specific to the insured, its business or its premises, rather than universal risks.

This point is reinforced by the subject matter of the other restrictions within the public authority clause, but I am making a simpler point, that with property insurance the objective aim is, normally, to

cover misfortunes that happen specifically to the insured. Of course it may be in company with others, but not misfortunes whose character is to affect the whole nation indefinitely.

The FCA skeleton deals with its point, paragraph 355, by saying that the government restrictions are in fact "specific to every insured". That is a misuse of language. Restrictions which apply indifferently to all cannot be described as specific.

My next short point is about the loss of attraction cover. Now, in relation to both clauses the FCA, if your Lordship wants a page reference it is on page 41 of tab 6 of the lead type 1 policy.

Now, in relation to both clauses the FCA argues that they cover diminution in custom. Its frequent assertion is that a business whose customers who cannot use it normally has suffered an inability to use or a denial or hindrance of access; for example, its skeleton paragraph 365 and 725. We will submit that those arguments are wrong on their own terms and we will deal with them.

It is, however, worth pointing out that in some of the Hiscox wordings, I think 13 out of 40, and many of those which include the NDDA cover, eight out of 14, there is separate provision for loss of attraction,

ie loss of customer footfall. So why are insureds who have the benefit of loss of attraction cover from Hiscox not invoking it? The answer is because it depends on physical damage, so it is not available. For that reason, the insureds have to try and shoehorn -- an overused word in this case, I apologise -- this head of loss into another cover, and to argue that loss of customer footfall is to be re-presented as an inability to use or a hindrance of access.

I want to make two supplementary points about that. The first is, although it is out of order, I would like to pick up my Lord Mr Justice Butcher's point on {Day 2/159:1} when my learned friend Mr Edelman was making submissions about the meaning of "interruption".

As I have just said, this clause, the loss of attraction clause, is in fewer than one third of our wordings, but it is in 13 out of 40. And the point that was put, it was my Lord's point, not the FCA's, was that the meaning of "interruption" must take its colour from the loss of attraction cover, which refers only to a shortfall.

My Lord, the first point about that is that that observation, if I may say so, proves too much. This extension of cover has nothing to do with interruption in any possible sense of the word, and I will come back

at a later stage of my submissions to show your Lordships that there is no case we have been able to find anywhere which construes interruption, and of course it depends on the policy, to mean anything other than a cessation. I will come back to that.

But a shortfall is not interruption in any sense. We explain this clause and we deal with what we anticipated would be the point, although it is slightly depressing that it came from my Lord and not from the FCA, in paragraph 285 of our skeleton argument. I am not going to -- it may be, who knows. I am not going to go to that now, my Lord. Can I ask your Lordships to read it and in due course to accept it. When I come back to interruption, I will say that the tail of loss of attraction can't possibly wag the dog of interruption, and there is an obvious explanation as to why the clause is there, and in fact it should have been below the line, which we will see on page 43 halfway down the page. It belongs with employees' lottery win and cancellation abandonment. I am just giving your Lordships a reference there to paragraph 285.

But can I make one other point, and this is a cautionary note, not a criticism of anybody.

The FCA spent most of its time looking at the Hiscox 1 wording, which is on pages 41 and 42. I sense

your Lordships have too. It is very tempting to do that because it is the fullest wording. However, it should be borne in mind, and your Lordships have annex 2 to our opening, that many of the Hiscox wordings have far more limited cover and many of these points simply don't arise at all.

Just let me give your Lordship one example. If you look at -- as I say, this is all in our skeleton at an annex 2, but if you go to {B/7/25}, here we have the lead Hiscox 2 wording, and there is far narrower cover and far fewer special covers. All that is covered is, so far as relevant to our case: public authority, which is between the two hole-punches -- sorry, that is not very helpful if your Lordship is looking at the screen; denial of access, but only where damage; financial loss; suppliers but not customers, and I will come back to my Lord Lord Justice Flaux's point on specified customers later in my submission, but it is not a point available on this wording because it isn't there; and public utilities.

The temptation of elegance, surely the most tempting temptation of all, is to give these words the same meaning across the board, but it is very important that your Lordships, unappetising as the task is, recognise that in many cases the Hiscox type 1 policy simply

doesn't apply, and it would be misleading your Lordships for anyone to suggest that it does, not that I am suggesting that anyone has.

LORD JUSTICE FLAUX: This is the hairdressers' policy, is it?

MR GAISMAN: It is salons, my Lord. Whether one gets anything in a salon other than one's haircut I shudder to think.

My Lords, can I then come on to a slightly more important topic in a sense, which is the essence of the insured peril under the clauses. What are these two clauses insuring against? What is the insured peril? Usually that is not a difficult question to answer. But in the case of business interruption insurance where there are composite elements, it is often the case that one has to analyse multiple elements to get to the core of the peril. This characterisation is particularly relevant to causation.

Before the opposite is said, or even written down, by my learned friends, this does not mean that I am denying or ignoring any of the elements, the composite elements of the insured peril, nor am I cherry-picking or ignoring what has to be reversed out in the counterfactual. But it goes to this question, my Lords, whether the parties can really have intended there to be

an indemnity for all the consequences of disease, once public authority action occurs, et cetera, as opposed to the narrower effects of the disease in combination with the other elements of the clause.

My Lords, the core of the peril yields the answer to the scope of the indemnity. The identification of the core of the peril yields the answer to the scope of the indemnity.

The fact that the separate elements in the clauses have to be causally related makes it clear that this is not a discrete insurance for each of them separately. So one has to ask the question: what is the essence of the insured peril? And I ask that question quite unapologetically, having dealt with the only specious accusation as to why this shouldn't be being done.

But I am fortified, my Lords, by the fact that the FCA actually agrees that one has to ask the question: what is the core of the insured peril? If your Lordships look at our skeleton argument at paragraph 352. If we have it on the screen, it is {I/13/112}. Picking it up five or six lines from the bottom -- well, picking it up at line 5, what is fundamental, we say, is that the cover is not for murder, disease, et cetera, provided only that there is something extra in the form of public authority action.

Cf, the FCA's position is "The cover is for the effects of murder or suicide, but only where there is public authority intervention -- that is the 'something extra'."

Then we say this is to turn the clause on its head. The cover is for public authority restrictions, provided they have been imposed following murder, bad drains, disease. It is not for murder, bad drains, disease -- provided only that there is consequent public authority action.

In a back-handed compliment, the FCA says that is really the heart of the matter. So that exchange, that statement and what the rival cases are demonstrates that there is agreement about the methodology; you have to look for what the core or the essence of the insured peril is. It is just that we disagree about what the core or the essence in fact is.

The FCA's case is clear from those passages, and if we could just remind ourselves what its counsel said on Day 1: insurers are insuring against the effects of contagious diseases and that includes not just the reaction of the authorities but also the reaction of the public. That was {Day1/98:1}. So if the public would have refused to eat in a restaurant awash with effluent, that is covered too as long as the authorities react.

On page 99, the subject matter of the clause is notifiable diseases. The subject matter of the clause is notifiable diseases.

Page 100, disease is the true nature of the insured peril.

Page 121, my learned friend had moved on to rats, but rats, he said, is what the cover is all about.

Those propositions are all unjustified as a matter of construction. Hiscox's case is that under these clauses it is essentially insuring the consequences of restrictions or denial, hindrance of access, imposed by the competent authorities, it is not insuring all the losses caused by the underlying reason for the restrictions.

That is clear from, in this case, unlike in RSA's case, the headings, which are an admissible aid to construction, there being no provision that says that one can't have regard to them. Neither of them refers to any underlying cause, but they refer either to the restriction or to the authority imposing it. It is clear from other clauses in the wordings, which refer to restrictions as the peril. My learned friend says that is a signpost. It is not a signpost, it is a summary of what the core of the peril is.

The other clauses that we have in mind are

identified in paragraphs 150 and 151 of our skeleton argument, where we also make specific and careful submissions about the structure of the public authority clause, and how the concept of restrictions imposed sits at the heart of the clause as a matter of meaning and syntax.

My Lords, in the NDDA clause, the reason for referring to the incident at all is because the draftsman wishes to make clear that it is not all denials of access by the authorities that will trigger cover, but only those which are caused by an incident within a 1 mile radius. The word "incident" is the hook whereby a 1 mile radius, or the vicinity, is attached to the clause.

Likewise, in a public authority clause, the presence of subclauses (a) to (e) is because the draftsman wishes to make clear that it is not all restrictions imposed by the authorities which will trigger cover, but only those imposed for the reasons identified in those clauses.

If those were not present, obviously there could be no doubt that the insured peril would be the denial of access or the public authority restrictions imposed. But what is clear, and your Lordship has heard this submission previously, but what is clear is that the local nature of the incident and the underlying causes

(a) to (e) are there to limit and qualify the public authority action which is within the cover. In other words, they cut down the breadth of the insured peril by making it clear that it only responds to a sub-set of possible causes of denial of access, hindrance of access, restrictions imposed. It is therefore, in principle, obvious that these limitations would be unlikely to have the effect of expanding the insured peril or expanding the indemnity. Nor does it change their character.

But one of the striking features, as we have seen from paragraph 352 of our skeleton, about the FCA's case on causation {I/13/112} is the way in which cover for X, but only on condition that Y happens, is transformed in the cover for Y but only on condition that X happens. Here we see why they are wrong. Since the local incident and the occurrence of disease are not insured perils in their own right, but rather their function is only to qualify and define the type of action which triggers the cover, and therefore are not also perils in their own right but only subsidiary elements in a composite peril, it cannot in principle be correct to require the insurer to indemnify the insured as if they were independent insureds perils.

One of the curious facts about this case is that if

one conducts the experiment of two insurers, one insuring pandemics in the broadest and most explicit possible terms, and the other, an insurer like Hiscox, writing cover on the basis of these two clauses, the astonishing thing about the FCA's case is that they are both going to end up paying the same indemnity. That is not logically impossible but it would give one pause for thought.

Curiously, my Lords, there are times, and this is really no more than a tease, when the FCA inadvertently agrees with us about this. For example, in paragraph 354 of its skeleton, {I/1/135}it says:

"The burden of the clause [and it is talking about our clause, the public authority clause] is authority action affecting the premises, not a disease occurring within a specified distance."

Of course they are dealing with a point about distance, which is the 1 mile radius point is absent from Hiscox 1 to 3, but I quite like "The burden of the clause is authority action affecting the premises". Although it is a Freudian slip, perhaps it is a recurrent one because, as I told your Lordship a minute ago, the irresistible rise of the disease to the status of the insured peril itself, as in paragraph 421 of the skeleton of the FCA, it has been

a remarkable rise from humble beginnings my Lords, because, as I told your Lordships earlier, in paragraph 60 of the particulars of claim the FCA was referring to vermin, disease and so on, ie the reasons in subclauses (a) to (e), as merely "part of the factual background". We agree.

What a contrast there is between that case, as formulated in the particulars of claim, and what is now said about vermin in the FCA's skeleton, as I say, in paragraphs 421 and 422, where the vermin have been promoted to the insured peril, and the requirement for public authority action is explained as being there first to ensure that only claims are made where the rats are really big rats and, secondly, to enable the insured to prove that they are. My Lords, though that is a slightly mischievous paraphrase, I have not failed accurately to -- as your Lordships can see if your Lordship read it for yourselves, that is the justification for the public authority action put forward in paragraphs 421 and 422 of the FCA's skeleton.

What does this come down to? We say this is going to look difficult on the page because the transcript won't emphasise the words I want to be emphasised, but the insured peril under these clauses can be expressed in this way so as to reflect where the centre of gravity

of the clause is.

If we take the NDDA clause, it is an interruption caused by imposition by the relevant authority of a denial or hindrance in access, so long as it results from an incident within a 1 mile radius or the vicinity. Then can we capitalise these words in the transcript: AND NOT AN INCIDENT WITHIN A 1 MILE RADIUS OR THE VICINITY SO LONG AS IT CAUSES IMPOSITION OR THE DENIAL OF OR HINDRANCE IN ACCESS.

Likewise, under the public authority clause, what it insures against is an interruption caused by restrictions imposed by a public authority causing the insured's inability to use, so long as though restrictions follow and are in some sense caused by one of the five reasons set out in (a) to (e). Then in capital the two words AND NOT each of the five reasons in (a) to (e) so long as these are followed by, and in some sense cause, restrictions imposed by a public authority causing the insured's inability to use.

That question of construction is obviously at the heart of the dispute between my learned friends and myself, between the FCA and my clients, and I leave that there with your Lordships for now.

I want to move to a different topic, which is restrictions imposed, or imposed. The words

" restrictions imposed" are in the public authority clause. The word in the NDDA clause is just "imposed", denial of access or a hindrance of access imposed by various local authorities. I want to deal with both.

These words, we submit, both individually and in context, clearly denote that which is mandatory and only that which is mandatory. The phrase or the word cannot be applied to guidance, advice or instructions which may be ignored by the recipient without infraction or legal sanction. It naturally suggests, and indeed the FCA agrees that it suggests, something compulsory.

The only things in this country which are compulsory for the population at large are those which have the force of law. A number of sub-points flow from that basic submission.

First, this is the natural and dictionary meaning of the word "imposed"; see our skeleton at paragraph 193.

Secondly, the fact that the imposer is stated to be a public authority or similar body is a clue, because these are bodies that have legal powers to impose, well, most obviously closure of a restaurant where there are rats in the kitchen, but in all other cases too.

Thirdly, the references to denial of access and inability to use are to the same effect. In a free country, somebody can access insured premises and use

them, and if that person is denied access or unable to use them, his own premises, because of restrictions imposed by a public authority, that can only be by operation of law.

Fourthly, my Lord, the March regulations were made by the Secretary of State pursuant to the 1984 Public Health Act, section 45C(3)(c), which empowered him to make regulations "imposing or enabling the imposition of restrictions ..."

We don't need have it on the screen but for the transcript it is {J/5.1/16}. This language was reflected in the preamble to the March regulations themselves. Let's get those up {J/16/1}, please. Where two-thirds of the way down the page, in the third paragraph of the preamble, it is recited that:

"The Secretary of State considers that the restrictions and requirements imposed by these regulations are proportionate ..."

Something that he has to certify under the statute. So this is all or should all be plain sailing.

Fifthly, my Lords, we demonstrate in detail in paragraph 199 of our skeleton, {I/13/63} that all the matters falling within subparagraphs (a) to (e) of the public authority clause naturally fall within identifiable legal or statutory powers.

Sixthly, if the distinction is not between what is mandatory and what is voluntary, in the sense in which I have used those expressions, how on earth is one to apply it? How does anyone know where they are in relation to this important contractual trigger?

There is a point on certainty here. Surely the natural point at which restrictions are imposed is when regulations are passed which have the effect of, as they themselves say, imposing restrictions.

Sixthly, and this is important my Lords, unusually for a point that comes sixthly, I have already said that one has to construe the wordings at the time of entering the contract and without knowledge of the unprecedented events of the last few months, in which the government has told people to behave in all sorts of highly intrusive ways. Falling short of legal regulation.

We have all been unable to resist examples which, according to taste, involve five helpings of fruit and veg a day or some implausibly small number of alcoholic units per week, and in a sense they are on one side, but the important point is this -- those are obviously not mandatory -- that the whole idea, viewed from the perspective of the contract date, of the government ordering us to do things in a non-legally binding way is completely unfamiliar. The whole concept of

restrictions imposed other than with legal authority or authority of law is bizarre. Indeed, to people interested and concerned about the rule of law in this case it has been a troubling feature of this crisis.

If one had asked the parties at the time of entering into these contracts: do you contemplate restrictions imposed by a public authority other than by operation of law? The answer would have been: what are you talking about? What sort of a country do you think we live in?

Faced with this language, the FCA has to accept that the phrase denotes only things which are mandatory and compulsory. It is therefore common ground that the parties would have agreed that only compulsion or prohibition can qualify as restrictions imposed.

We naturally accept that insofar as regulations were promulgated by statutory instrument, requiring people to do or not to do something, they qualify as restrictions imposed, obviously. So the simple question that remains is whether any pronouncement, fiat, advice, ukase, not contained in regulations was mandatory.

Now the FCA's case, as your Lordships know, is that everything that the Prime Minister or other ministers, and I expect government scientific advisers too, I am not quite clear how far it goes, everything that the government said by way of guidance, exhortation, urging

and instruction was mandatory and compulsory and, insofar as it asked or told people not to do things, was a prohibition. That is taken from paragraph 13.1 of the reply.

My Lord, I understand that the FCA has undertaken to put forward policyholder's arguments in this test case, but there must be a limit, my Lord, and the way in which the FCA puts this case in its skeleton is remarkable.

That which the government would expect UK citizens to comply with is compulsory; that is paragraph 123. In paragraph 375 we get the idea of compulsion on the "say-so" of the government. This extends to "advice"; to what the government was "asking" people to do; what they "should" do; and what, in a peculiar phrase, the government would "no longer be supporting". I don't blame my learned friends for that phrase, I have no doubt it came from the Prime Minister or one of his ministers.

It is said in paragraph 376, but my learned friend by mistake, as I will show your Lordships, retreated from it, but it is said that all of this is "not voluntary"; paragraph 376. And in a curiously Victorian phrase, reminiscent of Frances Hodgson Burnett, in paragraph 377 we are told it is all a question of how these statements would be received by the "populous".

Perhaps most Orwellian of all was the FCA's suggestion on {Day1/63:1} that the guidance should be regarded as mandatory -- may we just get that up, please -- lines 8 to 9 on the screen. Yes. At line 6:

"Behind the government's announcement [this is my learned friend Mr Edelman] telling people what they thus do was an appeal to comply [that must be ' voluntarily '] in order to avoid or minimise the government being enforced to invoke the law."

My learned friend, with respect to him, misspoke there. His case is that it wasn't voluntarily. But if that is right, he has given the game away and what, in this Orwellian phrase of my learned friends, your Lordships are invited to suggest is that the request that guidance be complied with voluntarily should be regarded as compulsory, because it carried the threat that the law could always make.

My Lords, all of this is fallacious and it is not necessary to spend any time on it. The Amlin/ Ecclesiastical skeleton treats the arguments crisply at paragraph 33, and we echo in our own inferior way these points in our skeleton at paragraph 210.

But I need to say a little more on this. First, it is important to understand why the FCA commits itself to this extremely unattractive argument. It is an

important part of its overall goal of blurring every different thing into one indivisible amorphous mass. If the Hiscox wordings, on their true construction, however, require a distinction between mandatory restrictions and non-mandatory guidance, one would have thought that the rational reaction was to ask which were mandatory, in the sense I have suggested, and which were not, and to recognise that the wordings only respond in the event and to the extent of the former.

But that approach will not serve the FCA's purpose. Of course its primary aim, as we have seen, is to render insurers liable for all the consequences of A; but if it can't do that, its next aim is to expand B as widely as possible so as to make B encompass everything that happened, and in due course they will do the same with C and D.

it follows from our submission, if we are right, that voluntary guidance, for example social distancing, falls outside the clause and cannot be relied upon as or in the context of denial of access or inability to use or for the purposes of causation and counterfactual. But it also means this, my Lord, and it is time to correct something that your Lordships were told on Day 1, it also means that the effects of people voluntarily staying away from businesses cannot be

within the clauses. Let us take the lockdown regulation, lockdown 6.

We will submit in due course that the lockdown does not engage either of the clauses that we are concerned with, but suppose that we are wrong about that, just for a moment. Even so, the lockdown was subject to the regime in regulation 6(2). {J/16/4}, please. There is regulation 6.

By way of example, any category 3 businesses, namely those identified within part 3 of schedule 2 of the 26 March regulations, were expressly permitted to stay open; see regulation 6(2)(a). The FCA agrees; see paragraph 64.3 of its skeleton. It follows that there must, ipso facto, have been a reasonable excuse to visit them, or at least that there could have been a reasonable excuse to visit them. There is a symmetry in the regulations between the businesses that are allowed to stay open, and the justifications in the form of reasonable excuses for people leaving home.

For example, to identify businesses within Part 3 of Schedule 2 referred to there, psychiatrists, dry cleaners, agricultural supply shops, osteopaths. I am not seeking to apply the ejusdem genesis rule to those categories, but they are four categories within Part 3 of Schedule 2 that were expressly allowed to stay open.

If we could have page 11 {J/16/11}. It is paragraphs 24 to 42, but your Lordship gets the flavour of it from that page: all the businesses in Part 3.

So if people chose not to visit those sorts of professionals, albeit that they had or may have had reasonable excuse to do so, that cannot have been as a result of restrictions imposed by public authorities, because there were none.

It is difficult to see how any person carrying on a business identified there, the osteopaths and the agricultural shops and so on, could bring a claim under either clause. But I can tell your Lordship that people within Part 3 of Schedule 2 have brought such claims.

Now I need to correct something that my learned friend Ms Mulcahy said on {Day1/37:37}. It is an understandable mistake, if I may say so. She told your Lordships on Day 1 at page 37 that 26 March regulations imposed restrictions on Category 3 businesses. Does your Lordship see that at lines 5 to 6.

She justified that submission not by reference to the regulation, which would have been difficult, but by reference to the Explanatory Note, no doubt drafted in as much haste as the regulations themselves. She is absolutely right that the Explanatory Note on page 12 of {J/16/12} -- can we blow that up a little bit, please, if possible, thank you -- the Explanatory Note says after the first sentence in the third line:

"... restrictions are imposed on businesses listed in Part 3 of Schedule 2 which are permitted to remain open."

She is right that that is what the note says. The trouble is the note is wrong. There are no restrictions on Category 3 businesses in these regulations, ie those named in Part 3 of Schedule 2. You will search the regulations in vain for any. It won't take you long. There are none.

The likely explanation for the mistake in Explanatory Note is that the word "not" has been left out in haste before the word "listed" in the fourth line. And that explanation, if we insert that, brings the Explanatory Note, if we can go back to page 3, into line with regulation 5.1 {J/16/3}, where we see the restrictions on business in regulation 4:

"A person responsible [I am reading 5.1] for carrying on a business not listed in Part 3 of Schedule 2 must ..."

There we see the restrictions. Anyway, I am sure my learned friends have plenty to do in reply, but if they could prove us wrong by showing us the restrictions on businesses in Part 3 of Schedule 2 in these regulations

I will apologise.

Now that is all I want to say by way of submissions on matters which are common to both clauses. I will leave the question of interruption over to a later stage. It is convenient to deal with that immediately after "inability to use", because the two in a sense go together.

So I am now going to go on to the NDDA cause. The argument for an indemnity under the NDDA clause is so feeble that even the HAG Interveners, the Hiscox Action Group Interveners are not bothering to advance it.

There are four points. It seems a pity to spend valuable time on this, but I must, partly because it helps to set the tone as it were for the debate under the public authority clause. There are four points identified in our skeleton at paragraph 84. First there was no incident. Secondly, there was no incident within one mile of the insured premises, or occasionally the vicinity of the insured premises. Thirdly, there was no denial of or hindrance in access imposed. Fourthly, even if there was a denial of or hindrance in access imposed it was not the incident within a 1 mile radius or the vicinity which resulted in the denial of or hindrance in access, the causation requirement within the clause.

Can I then spend a moment on -- and this is by way of supplement to the general submission that I made at an earlier point this morning -- can I come back to the word "incident", "an incident". For the moment I am going to -- no, that is what I am going to do.

We have seen what is meant in law and in ordinary parlance by an incident. It is important not to construe the word in isolation. So what helps does the clause give us as to the meaning of "incident". The incident has to be one which, as the clause contemplates, is the sort of incident that can be said and verified to occur within a 1 mile radius or the vicinity.

Secondly, it has to be the sort of incident that the parties at the time of contracting would have contemplated was liable to cause the public authorities, or the other authorities named, to deny or hinder access. It is that sort of incident with those characteristics that is meant.

We can all easily imagine the sort of incident which the clause contemplates as paradigm: a burst water main, a gas leak, a traffic accident, a crime.

Clearly a global pandemic which led to unprecedented measures could hardly be further away from this sort of incident that the parties must have had in mind. Indeed

if you were trying for the purposes of an academic exercise to think of something least like an incident a pandemic would come pretty close.

It is worth reminding oneself, so eloquent is Mr Edelman, that one has to remind oneself that this clause makes no mention of disease at all. It is the most formidably Procrustean undertaking on the part of the FCA to try to force COVID into this clause in the first place.

However, the FCA will have none of this. It says in paragraph 714, it actually says about this clause:

"A pandemic is contemplated".

That is its primary case. We will to agree to differ on that.

Of course the FCA needs the incident to be the pandemic because, looking ahead to a later element in the clause, nothing less than a pandemic caused the government reaction which is the alleged denial or hindrance in access. But as I have already submitted, an incident like an occurrence is not a national or international state of affairs which has persisted and appears likely to persist indefinitely. The pandemic, as we say in our skeleton, is too geographically dispersed, too prolonged, too variegated, too non-specific to qualify as an incident within the

ordinary meaning of the word.

I have already explained that the cause of the government measures, and indeed the pandemic itself, is a whole set of things extending into the future; a great mass of unpredictable causal influences on the government's decision to take these astonishing measures.

But even if one were to accept that the pandemic is no more than the set of individual cases of the disease in existence at the time of the measures. The set of the incidents is not itself an incident.

Outside the obscurer regions of Russell's paradox a set is not a member of itself. Hence the examples of the blitz and of recent protests that we give in our skeleton at paragraphs 91 to 92.

The FCA's alternative case is that there is an incident within the clause when someone with the disease is shown to be within the radius.

Now this alternative definition of "incident", even if it were made out, is of course not going to help the FCA because even if one puts entirely on one side major questions about proof of prevalence it is going to be quite impossible for the FCA to prove that anything which happened within the radius caused the government measures.

But for the moment the question is this: is the presence, and I emphasise the word "presence", of someone within the circle the sort of incident contemplated by the clause.

Note this is how it is put by the FCA. They have got an eye to difficulties of proof, and so they don't seek to say, as one might have thought they might, that the infection within the radius is the incident. It is the presence of a person that is said to be the incident.

But this is even more hopeless. Even if one regards the government as somehow reacting to an individual case of disease within the radius, it is the fact that the person has acquired the disease that matters, not the precise movements of that person either side of an imaginary circular line that matter. They are not of the slightest interest to anybody.

So as an incident, meaning the sort of incident which this clause contemplates causing a denial of access, the person with COVID crossing this notional line is a nonstarter. He might come and go without ever knowing he had the disease; he would behave in just the same way he was asymptomatic as if he was not infected; people would look at him and not know he was infected.

Such an undetectable happening cannot be the sort of

thing which the clause contemplates as an incident liable to result in a denial of access.

Moreover, as we say in your skeleton, paragraph 267, in the context of the public authority clause, let us assume that the whole of the FCA's case on prevalence is made good. That means that the existence of an incident within 1 mile of an insured's premises can be proved by an analysis of data: the application of averages and the use of an undercounting regime. Assuming that all this is allowable, it will in many cases prove for the first time the existence of the disease within a particular area.

So the presence of someone with the disease will have been proved not in March, not today, but at some point in the future.

Now of course, as we are reminded by the FCA, trees fall in woods even when they are not seen to do so. I hope we are not guilty of saying anything different. That is not the point. The question is whether the parties were contemplating as an incident resulting in a public authority action, the sort of thing which nobody might know about for many months, if ever. And we submit that the answer is no.

My Lord, it has been a longish morning. I am happy to pause there, or I have got another heavy -- it might

take me a little more than five minutes.

LORD JUSTICE FLAUX: Why don't we break now for lunch. If we say just before 2 o'clock. All right.

(12.56 pm)

(The short adjournment)

(1.58 pm)

LORD JUSTICE FLAUX: When you're ready, Mr Gaisman.

MR GAISMAN: My Lords, the next heading is "Incident occurring within the radius".

This issue only arises on the FCA's primary case as to the meaning of "incident". Clearly, if someone with the disease is what an incident means, someone with the disease within the radius is within the radius. How one might prove that is a different question, which I'm not addressing.

So we are setting on one side the case of the individual presence of the disease within the radius, and dealing with the primary case. Therefore, the question reduces to this: is the pandemic meaning more than, but if not, at least, the aggregation of all cases of the disease which caused the government measures, is the pandemic, in that sense, an incident occurring within the radius, 1 mile or vicinity?

Obviously not. This does not depend upon the meaning of the word "within", although I will come to

it. The radius requirement is obviously in the clause to confine cover to local events, very local in the case of 1 mile. A pandemic is the antithesis of a local event.

The FCA says that the pandemic was everywhere in the UK. Well of course, as we know, that is not even true of cases of the disease itself. It may be true in a general sense of the emergency or of the government measures taken in response. But I want to ask a rather more fundamental question. What does it mean to say that the pandemic was everywhere in the UK? The pandemic of COVID is different from the individual cases, but to say that COVID is everywhere in the UK is actually a figure of speech.

The statement operates on a quite different plane of meaning from the requirements stipulated by the clause. Let me give an obvious example. Assume that the room from which I am speaking contains neither a sufferer from COVID nor the virus itself. To say that the pandemic is everywhere in the UK does not mean that the pandemic is in this room. Far from being a necessary corollary to the statement that the pandemic is everywhere in the UK, to say that the pandemic is in this room is actually a nonsense statement. It is like saying that World War II was in a library in Newcastle

on the second Tuesday in January in 1943. It is meaningless.

It is equally meaningless to say that the pandemic is within 10 yards of this room, or 100 yards of this room, or 1 mile of this room. It is everywhere, but nowhere in particular. And even if the FCA was right to say that "within" means both inside and outside the radius, the pandemic is not and no part of it is within the radius.

The requirement that an incident must occur within a 1 mile radius is a stipulation of a specific geographical condition which must be satisfied. To say that the pandemic is everywhere is poetic, but does not satisfy that unpoetic condition.

But in fact insurers are also right, although they don't need to be, to say that the preposition "within" denotes that the incident must be within the circle and not outside it, as in phrases such as "within these four walls" or "these premises are supervised within the hours of daylight", meaning during the day and not otherwise.

The purpose of the requirement is to ensure that local events are covered, and only local events. Why else is the requirement for proximity inserted? Your Lordships have well in mind the point that on the FCA's

case the radius requirement serves no useful purpose at all.

The sort of ordinary incident contemplated by this clause would ordinarily have no difficulty in satisfying this criterion. Of course there might be borderline cases, but this is not a borderline case. Clearly the pandemic is in no sense local.

The next requirement under the NDDA clause, the third condition, is access, which has to be denied or hindered. The clause requires a denial of or hindrance in access. This access is a specific concept; it means a way or means of approach or entrance. That is its common ground meaning, as we see from the FCA's skeleton at paragraph 153.

It means that a notional person nearing a building or at its front door is stopped or hindered from proceeding any further. In the normal case of a gas leak, a crime scene or a traffic incident, the denial or hindrance of access will be obvious and uncontroversial, and there is no need to give these words a strained meaning but that is exactly what the FCA does. It is an abuse of language to say that someone who sets out from his home, 100 miles away, intending to visit a business and who finds that the local bus which he needs to take to the station to catch the train to the business is not

running, it is an abuse of language to say that he has been hindered in access to the business.

Not only is it not an available use of language but also our submission is consistent with an American case cited in footnote 115 of Zurich's skeleton, a case called Bienville v ACA, which decided that the Federal Aviation Authority's closure of all the airports in America after 9/11 did not constitute a denial of access to a particular New Orleans hotel. Hardly a surprising result.

It is a misuse of language to say that a man confined to his house in Manchester has been denied access to every business that he wants to visit. He is not denied access to a business in London. He is, to the extent that he is, denied egress from the home in Manchester. Accessing a building is different from using it. Use is dealt with in the public authority clause. They are different concepts. As is proved by the fact that you need access to a building in order to use it, but that simply shows they are different things. Moreover, you may be permitted to access a building but not permitted to use it, like the restaurateur who lives over the shop, so to speak. They are different things.

Now, use of premises may have been rendered legally impossible, depending on the type of business and

whether it was required to close. Inability to use, as I say, is covered by the public authority clause. But giving the word its ordinary meaning, "access" was never denied or hindered.

Moreover, the Hiscox NDDA clause, as you see from page 41 of the bundle, does not contain any pronoun before "denial". This is to be contrasted with the reference to denial of access in the general denial of access clause and in the bomb threat clause in the Hiscox 1 wording, both of which refer to "your access"

There are two possible explanations. Either the word "your" is to be understood as there being no reason to suppose that there was intended to be any difference between the three cases, or what is referred to is a general denial of access to all members of the public. The denial or hindrance in access referred to has to apply indifferently to all members of the public, that is clearly what is intended. The incident has to result in no one being able to access the premises or everyone being hindered in doing so. In the paradigm case of the operation of this clause, the bomb scare or the gas leak, none of this would give rise to any difficulty. From which it follows that it is not enough to trigger the clause that a certain class of people cannot get access, the denial of access has to be to the public as

a whole.

There is one potential situation in which the clause, the hindering of access might apply, because one of the things which is relied upon in the FCA's case is social distancing, and the point is made that if you have to queue outside a shop because you are only allowed in two by two, and then two metres apart, you are being hindered in your access to the building.

Well, your Lordships don't need to decide whether that is right or wrong if, as I submit we plainly are, we are right, in our important point that I developed earlier this morning, that the clause requires that the denial of or hindrance in access has been imposed by the relevant authority, and social distancing was not imposed in that sense.

So we submit that our primary case is that there was no denial of or hindrance in access, properly understood, that term being properly understood, in relation to any business. Alternatively, and if we are wrong about that, any business except those required to close by regulations 4 and 5 of 26 March regulations and their predecessors.

Again, Zurich cites US authority on point. The case of Syufy Enterprises v Home Insurance referred to in paragraph 119 of its skeleton, {I/19/52} was a case of

a dusk till dawn curfew in a city, held not to amount to a "specific prohibition" of access to a theatre in the City. The result would have been no different if the word "specific" had been absent.

So none of curfew, house arrest, imprisonment, regulation 6, amounts to a denial or hindrance of the right to approach and enter a place.

The FCA's case, by contrast, has to be that regulation 6 was the imposition of a denial of or hindrance in access to all insured premises everywhere.

Nor is there anything surprising about the conclusion for which Hiscox argues under this clause, it is an extension of a property damage business interruption cover, it is workable, sensible, comprehensible, has plenty of scope for application in the real world. It would readily respond to action by the authorities, resulting from local danger or disturbance and in the prevention of physical or legal access. These are the types of situation that the clause was designed to meet.

The fourth and final point is, of course, causation within the NDDA clause. This is perhaps the most difficult for the FCA of all -- a hotly contested title -- it is the fact that the incident within the 1 mile radius did not result in the imposition of or

denial of hindrances in access, as the clause says it must.

I have already identified what I call the bind which the FCA is in. Just to repeat it, the pandemic emergency, as I have explained it, caused the government measures, but was not an incident within the 1 mile. Whatever was within the 1 mile, nonsensically a little bit of the pandemic or, so the FCA says, an individual case, albeit in many cases only to be proved by scientific evidence hereafter, did not in any sense cause the government measures.

This bind is no surprise, because it is a function of the attempt to make this clause and also the public authority clause, as we will see, apply to a situation for which it was never intended.

There is no need to spend long on this point separately. We have dealt it with in our skeleton, where, for example in paragraph 129, we draw attention to paragraph 53 of the particulars of claim, and its tortured parentheses all apparently within the understanding of the reasonable citizen whose spectacles we are supposed to put on while construing this contract.

I just add two points in relation to the FCA's alternative case.

First, where there is a national pandemic and government intervention, what rational reason could there be for providing cover to business A, because it so happened to be just within a mile of a care home where COVID had taken place, and not to business B, which was just over a mile away, when both of them have suffered business interruption loss through precisely the same pandemic? The assumption I am making is that the pandemic is somehow covered.

Secondly, a connected point, if the insured has difficulty in proving either that illness was sustained within the radius or that such illness caused the interruption, that is because the cover was objectively intended to respond to a situation which was local and provable. In the present situation, we have not only a national/international situation, but if one starts trying to apply the clause to that type of situation, it is hardly surprising that fraught epidemiological questions are going to arise.

That is all I want to say about the NDDA clause and I turn to the public authority clause.

Much of what I have already said is relevant to this clause. In particular, I have already pointed out that the clause requires nothing more and nothing less than an occurrence of a notifiable disease as the reason why

the public authority restrictions are imposed. I have explained why it does not make sense to treat the circumstances which led to the government's measures of March 2020 as an occurrence. I will come back to that. It is actually a point which needs to be added in as an additional point in the summary in our skeleton at 154.

Can I first say something very briefly, because I have really covered this ground, about the structure of the public authority clause.

Your Lordships have {B/6/42}. It is now familiar territory even to your Lordships, who have dozens of different wordings to grapple with. We look at this and we wonder how anybody can call that public authority clause a disease clause. It almost beggars belief. However, that is exactly what the FCA does call it. We collect the references in existence at the time in footnote 151 of our skeleton. But on Day1, loyal to the position which the FCA takes, both my learned friends Mr Edelman and Ms Mulcahy referred to it in these terms. Just as one example, my learned friend Ms Mulcahy referred to the "Hiscox disease clauses"; that is page 55, line 14. {Day1/55:14} This is a complete misnomer and an unvarnished attempt to beg the question, a rather important question. And of course the reason

why the FCA does this is because it has an eye on causation and it wants to soften up the ground in preparation for submissions such as are contained in paragraph 421 of its skeleton, the cover is for the effects of disease as long as there is something extra.

Now we have already covered this ground. As I said this morning, we conduct a careful analysis of the structure and syntax of this clause in our skeleton at paragraphs 149 to 153. {I/13/48} I have already made submissions about how the restrictions are the core of the insured peril, and I am relying on, as I said, the title of the clause, the language and structure of the clause, the substance of the clause, and other non-coverage provisions, in particular the indemnity period, the under-insurance clause, in some cases the trends clauses, which refer to the peril as the " restriction ".

So taking my earlier submissions as it were incorporated by reference, I now come back to the meaning of the word "occurrence". To be quite clear, the phrase is "an occurrence of any" -- I paraphrase -- " infectious or contagious disease ".

Now, we have a positive case on this and a negative case on this, and one is simply the obverse of the other. The negative case is to say that this phrase

does not mean, nor encompass, the emergency, the pandemic as it was in March, in the sense that I described it this morning, the conglomeration of existing cases, apprehensions of future development, scientific modelling, the imperative need to protect the NHS, and the vast range of considerations which were the true cause of the government measures, as the occurrence has in some senses caused the measures here.

The positive case, which is simply the obverse of the negative, as I say, is that the phrase "an occurrence of any infectious or contagious disease" therefore means something limited, small scale, local and in some sense specific to the insured. It may be difficult to define those criteria with absolute precision, but that is often true of contractual terms and the court is not writing an essay, as was observed at the first case management conference, but simply performing the everyday exercise of construing a clause and answering the question of whether a given set of facts falls within the clause and in either case, whether it does or it doesn't, providing reasons.

Now, the FCA caricatures this argument as merely an attempt on Hiscox's part to imply a geographical limitation to the occurrence; for example, paragraph 345 of its skeleton. That is wrong in two respects.

First, it is not a question of the implication of terms at all. We have disposed of this canard in paragraphs 219 to 222 of our skeleton. Both sides invite the court to construe certain terms in the wordings by supplying additional words which are not there. So, for example, the FCA says that " inability to use" means inability to use in whole or part. I am not accusing, of course I am not, the FCA of trying to imply a term. That would be a very wooden accusation. I say that they are wrong, but what they are doing is a perfectly legitimate thing in principle, which is to invite the court to understand the meaning of words in a contract. That is not implication of terms, whichever side is doing it.

Secondly, to reduce the argument to an attempt to draw a radius around the circle is to oversimplify it. The question is not simply whether a case in Alnwick is an occurrence for the purposes of a business interruption cover in Ilfracombe, it is much more than that, and much of my argument does not even require me to be right on that point, although it will follow, or it may follow, that I am.

I have already addressed the reasons why the emergency which caused the government restrictions were something of a quite different order of magnitude from

an occurrence as contemplated by the clause. It is an argument that takes its point of departure from paragraph 43 of the particulars of claim, which I read to your Lordships this morning. But there are several further points which support my submission, and some of these are reactive to things that were said during the course of argument.

As I have already submitted, my Lord Lord Justice Flaux was, with respect, right to stress at the outset of the FCA's submission this clause stipulates for an occurrence, not lots of occurrences, but an occurrence; {Day2/130:1}. The way in which my learned friend Mr Edelman came back on that was to say: ah but look, it is an outbreak. An occurrence of any human disease, an outbreak of which must be notified to the local authority.

There is nothing in the word "outbreak" which implies some alteration of the order of magnitude of the occurrence. An outbreak can after all mean one or two occurrences. All that the word "outbreak" is doing is indicating that it must be a disease which, if an outbreak occurs, is notifiable.

To say, as the FCA did, that "outbreak" is apt to cover a multitude of cases is, in context, either wrong or beside the point. Indeed, for good measure, I am

sorry about this wrinkle, in all the Hiscox 2 wordings the word "outbreak" is not even present in the public authority clause, but only in the definition of a Notifiable Disease. The same is also true of the Hiscox 4 wordings. Would your Lordship like me to make that point good? It is {B/7/25}, clause 5(b).

MR JUSTICE BUTCHER: "Notifiable Disease" is defined in terms of an outbreak which must be notified.

MR GAISMAN: It is, my Lord, yes, that is true. But if one is looking at the clause itself, it reinforces my point that the word "outbreak" is merely there to define that which it is which must be reported, namely an outbreak. That is all I am saying. I would not try to say any more than that.

LORD JUSTICE FLAUX: Hiscox 2 just says "Notifiable Disease", defined as being a disease, an outbreak of which has to be notified to a local authority. Hiscox 1 simply spells it out. But your point is that either way what it is talking about is a notifiable disease. It is not saying that there is only an occurrence in circumstances where there has been an outbreak in the locality so that it has been notified, because if that is all it meant it would say so, and it doesn't.

MR GAISMAN: Yes, the point is in a sense the converse. I am not making much of the fact, or indeed I don't

think I am making any anything of the fact that in Hiscox 1 it says "local authority", and that is simply describing the criterion of notifiability.

MR JUSTICE BUTCHER: Yes, I understood that. It seemed to me that when one first read that clause you might think that that was a pointer towards locality, but as I understand it you don't make that point at all, you just say that that is a way of defining the disease, which could also be described as a notifiable disease.

MR GAISMAN: My Lord, there would be no point, of course, which I would not adopt if I thought it helped, but I am struggling to adopt that one.

LORD JUSTICE FLAUX: Right.

MR GAISMAN: Where we go from there is this that the FCA says, on {Day2/132:1} they say: well, Hiscox say that they can't have been intended to cover misfortune whose character is that they may affect the whole nation. And my learned friend then gave examples of widespread storms and floods which he said could affect "the whole nation"; that is {Day2/133:4}.

My Lord, those are far-fetched examples indeed. A nationwide flood or storm has, as far as I'm aware, never happened in the UK and cannot be presumed to have been within the parties' contemplation. To be sure one can have a large local event, like the great fire of

London, or you can have a small local event like the house next door going up in flames, but both of those events are local. And if there is a huge storm across the UK, then insureds in both Alnwick and Ilfracombe might face property damage causing a business interruption. But if there is an outbreak of measles in Alnwick, the overwhelming likelihood, viewed prospectively, is that that is not going to cause a restriction making an insured in Ilfracombe unable to use its premises.

Moving on, my Lords, I am going to have something to say about noscitur a sociis, and it is not confined to lists. Before I get there, before I get to that common sense anti-literalist maxim, consider the fact, if we can go back to the public authority clause in Hiscox 1 on page 42, that the public authority that is being referred to in that clause is the same public authority -- I am not saying that the word can't embrace national government, but let's look at the clause as a whole. The public authority that is contemplated by that clause is the same public authority as is going to impose restrictions in the event of vermin, in the event of food poisoning, in the event of a local crime or suicide. In other words, a local authority of some sort reacting to a small scale local event.

These are pointers. None of these is a point which is, as it were, a knock-out blow, but what we are doing is accumulating, textually and by reference to the language of the clauses and the wordings, clues as to what the parties must have meant.

By the same token, my Lords, there is in certain Hiscox 1 and Hiscox 4 wordings cancellation cover, and your Lordships see that on page 43. {B/6/43}. It is towards the foot of the page.

What we see here again is a distinction between the sort of local event that we say is contemplated by the public authority clause and the exclusion from the cancellation all risks cover, because that is what it is, right at the foot of the page (iii):

"Any action taken by any national or international body or agency directly or indirectly to control, prevent or suppress any infectious disease."

Now, the FCA makes the facile argument that the absence of that exclusion outside the cancellation cover proves or tends to prove that Hiscox did not intend to exclude the effect of pandemics except in the cancellation cover.

There are many things wrong with that argument and we summarise them in paragraphs 33 to 44 and 248 of our skeleton. However, the main point, ignored by the FCA

in its oral as well as its written submissions, is that this cancellation cover, unusually, because it is an add on, is all risks cover.

The true position is that the contrast between this sort of language in the cancellation cover and the more prosaic confined wording in the public authority clause suggests that coverage of something altogether more local was objectively intended by the latter.

Then, my Lords, there is the cyber attack cover in all but one of the Hiscox 1 wordings and two of the Hiscox 4 wordings, including the lead. We can see that on page 44 {B/6/44}.

I'm sorry, we are going to go to paragraph 44 in a minute. The definition of "Cyber Attack" -- sorry the cyber attack cover is on page {B/6/42} and the definition is on page {B/6/40}.

Now, a cyber attack sounds pretty far-reaching and serious, and indeed they can be for obvious reasons. But if we note the definition of "Cyber Attack" on page 40 {B/6/40} it is extremely confined to the activities of either a third party, that is in (a), or (b) a hacker who specifically targets you alone.

The cyber cover itself, as I said, is on page 42, and on page 44 {B/6/44} we find at the top of the page under the heading "What is not covered", we find this:

"We will not make any payment:

1. For any interruption to your activities directly, or indirectly caused by, resulting from or in connection with ...

"(b) any virus which indiscriminately replicates itself and is automatically disseminated on a global or national scale or to an identifiable class or sector of use unless created by a hacker."

And a hacker is somebody who is defined as somebody who targets the insured.

Now, it is not a merely verbal point to say that the nearest thing to a coronavirus contemplated by this policy is a computer virus. And we say in our skeleton, at paragraph 246 that there can no clearer objective indication of Hiscox's reluctance to accept liability in respect of pervasive events, especially non-damage related, than the words in the computer virus exclusion. It is an obvious statement that given the level of society's dependence upon information technology, computer viruses, just like a pandemic, have the capacity to reek global havoc, indiscriminately making businesses unable to function and causing devastating impacts upon normal, economic and social life, and this wording is an additional pointer to the fact Hiscox wanted nothing to do with risks of this breadth.

If one had time, one could look at many of the other special covers in those cases like Hiscox 1., where they apply. The picture that emerges, and we deal with this in our skeleton at paragraphs 234 to 244, it is quite clear that the potentially wide cover for business losses has been carefully circumscribed by the draftsman of these wordings with a whole variety of limiting factors; the need for material physical damage, insured damage, in many cases being just one example.

Now let's get to the precise point. The FCA's case is apparently this, that in the case of an occurrence of disease alone the Hiscox underwriters are to be treated as having thrown caution to the winds and assumed an unfettered liability for the consequences of any notifiable disease anywhere, with no proximity, locality, connection with the insured or its business, other than the fact of an inability to use, and all as an adjunct to an adjunct to properly cover. Indeed, this is what the FCA says, in paragraph 350, was what was clearly intended.

We submit that not only is this highly improbable from an objective standpoint, but on the contrary it is objectively obvious that Hiscox intended no such thing.

I hope your Lordships won't have noted desperation in my voice. I put it that way, my Lord, because the

FCA describes the argument that I have just addressed to your Lordship as "desperate" in their skeleton at paragraph 345.

Well, really. But in that spirit, and since one might as well be hung for a sheep as for a lamb, I suggest, on the contrary, that any experienced insurance lawyer who looked at the public authority clause would have the same immediate reaction. Of course this clause was not objectively intended to cover the international and national emergency which, together with all of its ramification, caused the unprecedented government actions in March.

The FCA's literalist argument to the effect that "the words can be made to mean that" -- when I say quote, I don't mean that I'm quoting the language that they have used, I am paraphrasing their argument that the words can be made to mean this -- is in effect a submission that coverage for this pandemic was coverage extended by mistake.

My learned friend Mr Edelman himself agreed, and I am now quoting him, "ordinarily one would only expect a local outbreak to have the effect" of creating an inability to use premises; {Day2/131:7} to line 8. Indeed. And that expectation is a good reason for concluding that coverage should not be extended.

Now, it is time to get on, whether or not in the forbidden Latin, to noscitur a sociis. Now, my learned friend has misunderstood the main way in which we deploy this argument because, as we make plain in our skeleton at 224 to 231, we are analysing, and I emphasise this, primarily the other covers within the public authority clause, in other words, (a), (b), (c), (d) and (e), and we seek to show how they of their nature, and by reference to the sorts of public authority powers which they contemplate, must be referring to small scale local events. Of course (b) is the one we are arguing about, but I am referring to (a), (c), (d) and (e). That is the context in which we rely on the maxim.

Now, my learned friend said this was a maxim to do with lists, and at one point my Lord Lord Justice Flaux agreed with him, on Day 2, page 134. {Day2/134:1} With great respect, my Lord, it is not a maxim confined to lists, although it is exemplified by lists. The authority mentioned by my learned friend says as much. He cited Lewison on Contracts; we don't need to look at it but it is {K/202/57}, where the learned author summarises the effect of the maxim in a sentence:

"Put shortly, it stresses the importance of context."

Of course lists provide a context, but they are not

exhaustive; it is not only in the case of lists that context is important. We have found an authority, and no doubt given more time we might have found more, where the maxim was specifically applied other than in the context of lists; the decision of Mr Justice Morison, called Swiss Re v United India Insurance, and that is at {K/122.1/9} to page 10. I don't need to take your Lordship to it.

But more importantly and as I say, my learned friend, as you will see if you re-read {Day2/134:1} to page 135, completely passed over the fact that the primary way in which we deploy this maxim is within the public authority clause, and that is a list.

Now if we look at cover (a), (c), (d), (e), of the other matters within the clause, subclauses (c) and (e) are expressly confined to the insured premises. Of the other two, (a) and (d), it cannot seriously be suggested that they relate or could relate to drains problems or murders, other than at or in the vicinity of the premises.

The same must be true, we submit, of the occurrence of the disease in (b). The FCA says that the necessary nexus with the premises is provided by the words in the introductory part of the clause " inability to use the insured premises", but that is not the point. I am

deploying the maxim and the principle of construction, which has regard to context, to the nexus which is in or plainly implicit in the subclauses themselves.

My learned friend then quoted Lord Justice Diplock in Letang v Cooper, and I congratulate him on his pronunciation, saying that the maxim is treacherous unless you know the societas to which the socii belong. That was {M/5/16}. Within subclauses (a) to (e) the genus, or the societas is clear enough; it is causes at or local to the insured premises.

Now we do, I accept, broaden the analysis, although this isn't relevant to many of the covers, to other cases within the Hiscox 1 wording where, in paragraphs 234 to 244, we make the point that the other insuring clauses comprising the special covers branching off the stem are similarly local or specific either to the insured or the business or the premises.

That is the argument, my Lords, on occurrence, and I hope your Lordships see that it is not merely an exercise with a compass and a pencil. It is a more substantial argument than that, although the compass and the pencil, so to speak, follow in its wake.

There is also a non-point, which we have dealt with in paragraph 261 of our skeleton, which both the FCA and the Hiscox interveners take, that because there is

a 1 mile radius in Hiscox 4, it must be assumed that there was a deliberated eschewal of any limit in Hiscox 1 to 3. That is a non-point, and it doesn't become any more of a point when Mr Edelman makes a sort of half allusion to the date at the bottom of Hiscox 4. That doesn't help him at all, because he hasn't established that the date at the bottom of Hiscox 4 is the first time when the geographical radius of 1 mile is put in.

So much, unless your Lordships have any questions, for the meaning of the word "occurrence" as it occurs in context in the public authority clause.

I need then very briefly to move on to causation within the public authority clause. There really is no distinct issue here. The parties are agreed that the word "following" in that clause denotes a causal element. A looser one than proximate clause, I'm not sure what proximate clause has to do with anything in this clause but anyway, never mind that, but a causal element nonetheless. That is paragraph 60 of the particulars of claim, and the amended defence, we got it right at the second time of asking, paragraph 101. The FCA accepted that causal relationship in its oral submissions on {Day2/140:1}.

So unless the occurrence is construed broadly enough to include what I call the real cause of the government

measures, it follows that the FCA will not be able to prove the required causal connection between an occurrence, wherever it is, even in Alnwick, and the restrictions imposed.

The FCA does not plead that an occurrence was the nationwide pandemic, and even if it did, it obviously wasn't.

The occurrence relied on appears to be the individual case or cases of a notifiable disease, but that didn't cause the government measures. Whatever the meaning and whatever the geographical ambit of an occurrence, it is not the pandemic or the emergency and, therefore, it didn't cause the restrictions. That is true not just of the Hiscox 4 wordings but of all of them.

Indeed, there is obviously a knock down argument on Hiscox 4, but my learned friend Mr Edelman doesn't even accept that, because he said on {Day2/138:16} that if a case of COVID-19 happened within a mile under Hiscox 4, well then they have cover. But that totally disregards the force of the word "following" and the obvious difficulty, which I don't need to say any more about, in demonstrating that an event within a 1 mile radius caused anything.

I now was going to move on, my Lords.

LORD JUSTICE FLAUX: Whatever else "following" means, and you are probably right that it is a looser causal connection than other phrases like "in consequence of", and I fully take your point that we are not dealing really with proximate cause at all here, that is a different concept in a different context, that is to do with whether the insured peril has caused a loss, but "following" has to mean, doesn't it, that there is an occurrence, and you have addressed us about that, which leads to or which causes in some respect the imposition of restrictions by the relevant public authority?

MR GAISMAN: That is our submission, my Lord.

I was going to move on now to different questions, the questions of inability to use, and then interruption. Because if we go now to the public authority clause, I have so far said nothing about what is meant by "your inability to use the insured premises".

What is the issue here? The issue is that Hiscox submits that the expression "your inability to use the insured premises" means what it says, namely that the insured must be unable to use the insured premises, and I will come back to what it means.

But the FCA says that any impairment of normal use, any impairment of normal use, constitutes your inability

to use the insured premises. So there is a big gap between the parties here.

The first question: whose inability to use is referred to. That is easy; it is the assured's use only that is relevant, because it says "your inability to use the insured premises".

The FCA agrees, paragraph 363 of its skeleton. The Hiscox interveners do not, paragraph 127 of their skeleton; they are obviously wrong and it couldn't be clearer.

So whatever is meant by "inability to use", the term identifies and assumes that the insured has a purpose, and that the use of the premises is its use for the purpose of conducting its business at the premises. It is not the customer's use and purpose that is relevant.

So these simple premises follow: the fact that the only use which is relevant is the insured's use, and the only person whose purposes in use are relevant is the insured's. The customer's use, in the sense of use for a purpose, is outside the ambit of the clause. Again, I remind your Lordship of the loss of attraction cover in some of the wordings. The customer's purposes, it follows, are also irrelevant. They are not attending the insured's premises for the insured's purposes but for their own.

We will come on to consider how that argument works when I come on to consider, because this is what it is relevant to, whether the lockdown regulation, regulation 6, engages this clause.

I am not overlooking the possibility that the customer's presence might fulfil the use of the insured, but I am delaying that point until we get to a slightly later point in the argument. All I am seeking to do now is to identify whose use and whose purpose are relevant. I hope that is clear.

Next the phrase "in context". Now, again we need look at this phrase in its context, and the various subclauses (a) to (e) are an important part of the context. They clearly envisage situations in which public authority action means there is likely to be total inability to use. Murder, bad drains, vermin, Legionnaires' disease, et cetera, are likely to result in total closure for a time, not merely some form of departure from normal usage. So the clause has plenty of scope for operation on that basis and that is the natural way to read the words.

Although the FCA called our construction a wholly uncommercial construction of the words in their context, {Day2/143: 1}, the FCA did not in fact address the context at all, and your Lordships were never told why

Hiscox's construction was uncommercial. It is a narrower construction than the FCA's, it is true, but epithets like "uncommercial" are just used by the FCA when it has nothing substantive to say.

On behalf of the Hiscox interveners, my learned friend Mr Lynch on {Day4/2:1} to page 4, seemed to advance a submission, as I understood it, that where words are capable of a broader or narrower meaning they should either be given the broader meaning or treated as embracing both, which is the same thing. I am aware of no such principle of construction.

Our next submission, my Lord, is that " inability to use" means what it says. Now, the first thing we see is that this phrase is unqualified. The FCA takes a very bad point in saying: oh it doesn't say "total inability to use". We have answered that point in our skeleton in paragraph 159 and I am not going to dignify it by taking up any time on it. But it doesn't help to say that the clause doesn't say "total inability to use", which it doesn't, because it also doesn't say " inability to use in whole or part". So the question of what the clause does not say, unsurprisingly, is neutral. Because you can supply any words you like to make the point you want to make.

The clause invites a simple question: is the insured

unable to use its premises or not? That is a binary question to which the answer must be yes or no. And ultimately, and this is important, it is a question of fact. Can the insured use its premises or not?

MR JUSTICE BUTCHER: I follow that you say it is binary and the answer must be yes or no, but it is at least possible that there are degrees of use which might qualify and might not.

MR GAISMAN: Your Lordship is absolutely right. I haven't, as it were, done more than lay the groundwork for the argument yet.

MR JUSTICE BUTCHER: I am sorry, Mr Gaisman, you are coming to that.

MR GAISMAN: Of course. But your Lordship's may in part have been influenced, or perhaps it wasn't, I hope it wasn't, by a mischaracterisation of what our argument is. Because it is very important to be clear what I am saying and what I am not saying, although I hope that was clear from our skeleton argument.

My learned friend calls our approach an absolutist one, {Day2/143:1}, but all I am saying is this, in disagreement with the FCA: an insured is not ipso facto unable to use its premises merely because it is only able to use part of them. The fact that, like most old men, I am only using 20% of the functionality of my

iPhone does not mean, obviously, that I am not using it. Why is the use of insured premises any different? But I stress the words "ipso facto". I do not deny that on given facts partial use may be sufficiently nugatory, vestigial as to amount to inability to use. I don't deny that at all, and we never have. But inability to use is not proven simply or merely by showing partial inability. That is our submission.

Now, I have had to spend time on that because the FCA caricatured our argument, and I am quoting from {Day2/144:1}, as saying that unless the insured can prove that he is unable to use every last square inch -- that is how my learned friend Mr Edelman put it, and he said that we had a last square inch argument; bad luck, there is a square inch over there you can use, therefore you can't prove inability to use. That is a complete caricature.

If I may qualify something that my Lord Lord Justice Flaux said on the next page of the transcript, possibly induced by that characterisation of our argument, there is not just a question of fact which arises if inability does not mean total inability, there is a question of fact in every case, because every case raises the question: does this inability to use constitute such an inability to use that it satisfies

the clause?

But what my learned friend is saying is any departure from normal usage ipso facto satisfies the clause. I hope your Lordship sees the difference between our position. I don't need to caricature my learned friend's argument, because I am able simply to quote his exact words; his position is, and he uses as an express example, that where you have a Chinese restaurant, 90% of whose business is always take-away, but it has two tables where, if you want, you can sit and eat your dim sum, he says that is an inability to use, and he said that 10% could be very important to the bottom line. No doubt it could. But it doesn't follow from that that a restaurant that is prevented from using the two tables in what is, to a vast majority, premises which are used for the purposes of a take-away, he says that is ipso facto an inability to use.

I say that is a very good example of something that is not merely ipso facto not an inability to use, but on the facts isn't an inability to use.

Now, whatever --

LORD JUSTICE FLAUX: It will all depend on the facts, won't it? But turning it around, if you have a restaurant which before the pandemic had 100 tables and it had, on average, 5 take-away customers a week, so basically it

didn't really do take-aways at all, it now finds itself in a situation where it can't actually use any of the 100 tables for people to eat in, but it can increase its capacity for take away to a limited extent, then depending upon exactly how the facts pan out, that may amount to an inability to use.

MR GAISMAN: My Lords, the short answers is yes. It is difficult to paraphrase this question, but my best effort at a paraphrase is to ask: can the insured use the premises at all or to any meaningful extent? If it can, it is not unable to use them. And it is the fact-finder's prerogative in any given case to reach the conclusion that so nugatory is the use which the insured can make of its premises that it can't use them to any meaningful extent. That is the fact-finder's prerogative, as long as it applies the correct legal framework.

MR JUSTICE BUTCHER: It might dangerous to paraphrase it though, may it not? Supposing we essentially agreed with the submission, it might be dangerous to go further than to say it's inability to use.

MR GAISMAN: Yes, it rather depends whether some -- I understand the danger of using paraphrases. But whatever your Lordships say, assuming you were sympathetic to the submission, I think everybody would

agree that it would be helpful if you could at least give some guidance. So, for example, it is very important, in our submission, to make clear that mere partial ability to use does not prove inability to use, which is a submission I made at --

LORD JUSTICE FLAUX: I think we have your submission and you essentially put it in two ways: you said partial use may be sufficiently vestigial to be an inability to use, and then you put the same point in a slightly different way, saying it may be that you can't use the premises to any meaningful extent and that therefore is an inability to use. So I think we understand the point that you are making. Even though, obviously, anything you say is going to be as a matter of principle as opposed to any particular facts.

MR GAISMAN: No, my Lords. One notes with a rather sour smile the limited role which the assumed facts are playing in this case, despite the hundreds of hours that were spent in attempting and indeed eventually succeeding in agreeing them. But your Lordship is of course right. I mean, we do have a very clear division between the sides. You may not think it wise for your Lordships to adopt the sort of paraphrase, but somehow one has to expose the fact that what is being alleged against me -- let's just see how extreme this is.

The FCA says that if you adapt to the new circumstances, the very fact that you have to adapt means you are unable to use your premises because you can't use them the way you were using them before. The mere fact that -- this is the Chinese take-away example -- that your usage is in some way inferior, so you have lost 10% of your turnover, that mere fact is sufficient to establish inability to use.

I mean, most astonishingly of all, both the Hiscox interveners and the FCA make the submission that the adoption of social distancing in a shop, say, constitutes an inability to use. That is the Hiscox interveners' skeleton, paragraph 127, and my learned friend on {Day2/154:1}, albeit in the context of interruption.

But even for those of us who, clad in Marigolds and other devices to ward off the virus, spent 45 minutes queuing outside Waitrose at least once will have found it hard to accept the submission that Waitrose were unable to use the premises. The proposition only has to be stated.

I have probably said enough to expose the difference.

LORD JUSTICE FLAUX: To quote a judge who almost said he never went inside a Waitrose, let alone queued outside

one. It's a quotation from Lord Justice Hobhouse in some case or other. The proposition only has to be stated to be rejected.

MR GAISMAN: All I will say to add to what I have said is that short of whatever it is that amounts on given facts to an inability to use, we don't accept that our construction is at all uncommercial because, as I have already submitted to your Lordships, the clause is aimed at situations which will typically cause total cessation.

We also have to bear in mind, we have been dealing with a crisis that has lasted for months and months, but the average case of defective drains or vermin or a police investigation of a crime or suicide typically is measured in days. One just does need to remember that.

MR JUSTICE BUTCHER: You can say that in relation to these types of matter which are in (a) to (e) there is a reason why insurers might not want to insure an interference which (inaudible) one which causes an inability to use.

MR GAISMAN: I am sorry, my Lord, I lost the middle of your Lordship's point but I'm sure I'm going to agree with it.

MR JUSTICE BUTCHER: Insurers might not want to insure (a)

to (e) unless it led to restrictions which led to a complete inability to use.

LORD JUSTICE FLAUX: The classic example is somebody has been murdered in the flat above the restaurant, the police are investigating, they need to do forensic work within the restaurant, so it is closed. Complete inability to use. Albeit for a short period of time, as you say.

MR GAISMAN: The same is true, my Lord, it is hard to believe that if a restaurant had vermin the inspectors will say, well, you have got to close the Portofino Room but the rest of the restaurant you can keep open. Not perhaps how one experiences local authorities, not that I have much experience, my Lord.

Just moving on then, there is a point that my learned friend Mr Edelman took on {Day2/146:1} in reliance on the rent clause. That is a bad point and it is answered in our skeleton at paragraph 161.

More substantively, however, there is a further point. The clause makes clear that inability to use needs to have been due to restrictions imposed. If I am right in the submissions I made earlier that this means mandatory measures, in the sense of measures imposed by law, the only sort of government measures which would qualify as relevant restrictions causing an inability to

use are compulsory measures in the sense in which I define them.

It follows that all voluntary measures and steps, including social distancing, for example, staying away from category 3 businesses, they all fall outside the clause and they can't be relied upon in the context of inability to use, even if, as it were, they establish an inability to use taken on its own. Because it is restriction posed which cause an inability to use, so one has to ask oneself what are the restrictions imposed.

Just to make good my point, although I am sure your Lordships have it, the FCA's case in their particulars of claim, paragraph 46, is overbroad on all fronts. First, because it includes all government measures, including advice. Secondly, and this is how broadly it is put, if we just look at {A/2/30}, the bottom half of the page, assuming your Lordships can read that:

"The advice, instructions and/or announcements as to social distancing, self-isolation, lockdown and restricted travel and activities, staying at home and home-working given on 16 March [that is before the regulations) and on many occasions subsequently ... amounted for all businesses on that date, alternatively on such subsequent date to be determined by the court,

in all cases for which access to or use of the premises by the owners/employees/customers was material ..."

Then each of the following, and we are concerned with 46.2, inability to use the premises for the purposes of Hiscox 1 to 4.

To the same effect in its skeleton, paragraph 360, which talks of using the premises for or with its intended aim or purpose. And the Hiscox interveners' skeleton, paragraph 125, refers to an inability to use the premises normally.

We submit that this is all far too broad. We have conceded, as your Lordships will have seen in paragraph 172 of our skeleton, that a business ordered to close down by regulations 4 or 5 of the 26 March regulations, and relevant predecessors, may well be able to prove an inability to use, assuming it was made out on the facts. We discussed restaurants, I won't say ad nauseam, that is a different clause, but let me give one or two other examples.

Business premises ordered to close, which are used to solicit or fulfil online or mail order businesses, are clearly being used. The business may be less active, but they will still be being used. We give the example in our skeleton at paragraph 185 of a tailor attending her cutting-room to work on her backlog of

orders, assuming tailors still do have backlogs of orders, or execute new ones that have been solicited by any of the permitted means. Her shop has been ordered to close to the public, but it does not follow that she is unable to use the premises.

But the FCA says in paragraph 365 of its skeleton:

"If the government prohibits a non-food shop from carrying on its business, then there is inability to use."

No, there isn't.

Now schools. A school which is being used for key workers' children or preparation or delivery of online assembly or lessons or other interaction with its regular pupils is clearly being used. The FCA says, in a submission which does not pay much regard to the language of the clause, that a school without children is not much of a school {Day2/148:1}. But the question is whether it is being used as a school; and if it is being used to educate vulnerable children or key workers' children it is being used as a school, or it is typically being used as a school.

Of course it will be a question of fact and degree. But the FCA's case, where the FCA's case goes wrong is that it all comes back to the proposition that any departure from normal use is ipso facto your inability

to use the insured premises; and that, with great respect to the FCA and my learned friends, has got to be squashed.

It is tedious to go on with this, but one sees the same sort of overstatement in paragraph 366.1 of my learned friend's skeleton argument. If we look or have that on the page, please, it is {I/1/138}. Thank you very much:

"Premises cannot be used without people. It is not only a matter of customers. The owner herself or himself, or the business' employees, could not legally attend work."

That is an oversimplification if one reads the regulations:

They were ordered to 'stay at home' (save for certain businesses)."

Quite a lot of businesses. For example, in category 3 and category 5. And anyway, always subject to a reasonable excuse, and so on.

It is an illustration of the failure to give any proper recognition to the effect of the significant qualifications and exceptions to regulation 6 and the position of category 5 and category 3 businesses.

Anyway, I think I have said enough about inability to use. I want to come back to an important question,

which is -- can we please have bundle B, the public authority clause again. Your Lordships have it open.

I see the time, my Lord. Would it be convenient to have the break now or would your Lordship like to go on a bit?

LORD JUSTICE FLAUX: Yes, it probably would be sensible to have a break now. My clock says 16 minutes past, so I will say just after 25 past, please.

(3.16 pm)

(Short break)

(3.26 pm)

LORD JUSTICE FLAUX: When you are ready, Mr Gaisman.

MR GAISMAN: My Lords, the question I was coming to is whether the lockdown regulations, let's just focus on regulation 6 of 26 March, fall within the public authority clause, your inability to use the insured premises due to restrictions imposed by a public authority. We say the answer to this question is no.

Now, the preparatory ground which I have laid has, if I am right, established that the clause contemplates only the insured's inability to use for the insured's purposes. The customer's use and purposes are irrelevant. Can it nonetheless be said, this is another way of putting the question, that the restrictions on the customers creates an inability on the part of the

insured to use the premises? Because that is what needs to be shown. The words "due to" ensure that that is the case.

Now, this is a question of characterising the relevant " restrictions ". The restrictions must be of a character which creates the inability. That must be common ground. They must be restrictions which cause an inability to use. Therefore, moving beyond the common ground, because everything I have said so far must be common ground, they naturally look, in terms of the character of the restrictions, to the position of the insured.

If one asks the question, "What is the natural and objectively intended meaning of your inability to use due to restrictions imposed?" the sort of restrictions imposed would be those directed to the insured and directed to its use of the premises. Once again, the context here is all-important. Closure of a restaurant due to food poisoning, closure due to vermin in the kitchen, problems with the drains, Legionnaires' disease in the waterworks, a suicide in the office; all of those are restrictions directed to the insured and the insured's use of the premises.

Of coursers, the effect of all of these is that customers cannot attend. The effect. But that

non-attendance of customers is the result of the inability to use, not the cause.

What the clause, we submit, is directed to is a regulation which tells the insured business that it may not use its premises for one of the five stated reasons.

By contrast, and maybe we should have them to hand, regulation 6 of 26 March, which is {J/16/4}, regulation 6 is not directed to the insured's abilities to use at all, it has a completely different subject matter; regulation 6 is directed at individuals' movements. And requirements in legislation for businesses to close or cease operations are not the same as restrictions on the free movement of the individuals who use them.

Nor do they become equivalent, and I am sure this point isn't seriously run, because they are contained in the same statutory instrument as regulations 4 and 5.

The clause and the causation exercise which would follow, if it were activated, requires one to ask: what is the ambit of the restrictions imposed, what falls within them and what falls outside them? One cannot lazily answer that question by saying: well, they are all in the same enactment so let's treat them all as a job lot.

But better than all of these reasons is there is

a very good reason why the construction which I am advancing must be correct been. We have all got used to the idea of a lockdown in the last several months. But once again I have to ask your Lordships to adopt the correct perspective of putting yourself back in a pre-COVID era, when this contract was notionally made. The very idea that a public authority could impose a form of modified house arrest, subject to exceptions, on the entire population, so that people were not allowed to leave home to visit their favourite shop or to get their haircut, would have been thought the stuff of nightmares, completely unthinkable.

So the idea that the notional parties would ever have contemplated that an insured business in the UK would be reduced to a state of inability to use by suspension of the entire public's freedom of movement, something which the FCA concedes in its skeleton was unprecedented, would have appeared impossible. It would have appeared ridiculous. Or, to put the point another way, the FCA's argument makes illegitimate use of hindsight. Because if one looks, now going back to the public authority clause itself, it wouldn't cross anybody's mind that the word " restrictions imposed" to apply to anything less or anything else than the premises.

MR JUSTICE BUTCHER: Mr Gaisman, I am slightly troubled by that, by reason in particular of (a) a murder or suicide. What would be the likely way in which restrictions were imposed as a result of that? I would have thought that at least one possibility is that a cordon would be put round the premises, and there the restriction may be on people getting to the premises rather than on the premises. Now I know that overlaps with the non-damage denial of access cover, but is it realistic to think that a suicide will lead to a specific restriction being imposed on the premises? And if so, under what?

MR GAISMAN: My Lord, most obviously in a form of closure of the building, because it is a crime scene. Perhaps I speak for myself when I say we are all obsessed with restaurants, but if you imagine a small solicitor 's office, for example, where somebody has committed suicide, I mean it is not impossible, of course, that the place itself, the insured premises itself could be the crime scene, and the most obvious example in all cases is a closure of the premises. I am not disputing that it is not impossible for a police cordon to be put up and that might engage -- actually, that would be a case which would be more likely to engage the non-damage denial of access clause, because the police

cordon is the paradigm example. But there are plenty of cases where a murder or suicide could simply prevent the use of the premises because the premises have been closed.

Even if it is possible to think of cases such as your Lordship has put to me, it is much harder to do so when one gets on to (b), (c), (d) and (e), which directly engage the health, if I can put it that way -- well, in all four cases, the healthiness and the safety of the premises. So I would submit it doesn't make much of a difference.

So the paradigm remains, my Lord, and what my learned friends are saying, they are not talking about a murder or a suicide, they are saying that the parties to this case are to be assumed sufficiently to have contemplated the possibility of lockdown to have naturally accepted that restrictions caused by -- sorry, restrictions resulting in an inability to use would naturally embrace what tendentiously I will call house arrest. But the truth is that nothing could have been further from their minds. That is certainly my submission, my Lord, but then I don't read much science fiction.

My Lord, there are other points too. The FCA has to argue that regulation 6 -- this is a necessary corollary

of the FCA's argument -- as soon as it is passed, summons into existence a simultaneous inability to use on the part of all insureds everywhere whose business relies to any extent on the physical presence of customers, because a customer confined to his home in Manchester creates an inability to use in Exeter.

I have already made submissions of this type in the context of a non-damage denial of access clause, and they will not improve on repetition. But if we are going to find a restriction imposed causing an inability to use, let's look at regulation 6 and see where we can find it. It is on the screen {J/16/4}.

Regulation 6 doesn't create an inability to use at all. Insofar as it mentions businesses, it mentions businesses that people can use. In particular, businesses in part 3 of schedule 2. Furthermore, regulation 6 is subject to various qualifications, the broad qualification of reasonable excuse and then the enumerated examples.

So you cannot tell by looking at regulation 6 whether an inability to use has arisen, except in the case of businesses named in part 3 of schedule 2, where it is clear that no inability to use has arisen by reason of schedule 6.

None of this is surprising, because regulation 6 has

nothing to do with inability to use. That is the purview, and then only to a limited extent, of regulations 4 and 5.

Even where a business is required to close by regulations 4 and 5, it is subject to exceptions; mail order, take-away, online, and so on.

As I have been submitting to your Lordship a little earlier, that may enable an assured to show is an inability to use or it may not, it all depends on the facts. But it doesn't matter how hard one stares at regulation 6, you won't get the answer to that question.

So we have got, as I have already mentioned, businesses in part 3 of schedule 2, where there are plainly no restrictions and the explanatory note is wrong, unless I am. Then there are all the category 5 businesses, which were not required to close.

Now, people could only visit them if they had a reasonable excuse. So we now seem to have got to a situation in which inability to use is bound up with the question of reasonable excuse, to leave home. But those are two separate questions.

That leads on to the next point. What about a business where the insured owner can reach out to people in their homes via Skype or Zoom or telephone or email? The fact that customers are, let it be assumed,

confined to their homes tells you nothing about whether those customers can access the insured business or not.

It is just another example of the way in which there simply is no correlation between the public authority clause and regulation 6. They are just different things intended for quite different purposes. And it is -- sorry to repeat myself, but it really is just pure hindsight to say: ah well, this is what has happened, customers have been kept away from businesses in their droves by something that nobody foresaw, therefore it is a restriction imposed which causes an inability to use. That is not how the parties to the contract will have seen it.

That is all I want to say, my Lord, except in a sense picking up on that last point. Even if I were wrong so far, and regulation 6 could somehow give rise to an inability to use, it does not mean that it would. That is a question of fact. And in many businesses it would not prevent use, especially if I am right that "inability to use" means inability to use at all or to any meaningful extent. Although your Lordships aren't enamoured of that paraphrase.

So unless your Lordships have any further questions, I then want to move on to the meaning of "interruption". For that purpose we need to turn back one page in the

bundle to page 41 of B6 {B/6/14}.

Under the stem, your Lordships know what we mean by the stem, under the stem to both relevant clauses an insured needs to show an interruption to its business or sometimes its activities. Whatever "interruption" means, nothing less than interruption will do, because that is the only term used. The term is "interruption", not disruption and, as we will see, not interference.

Our submission is that interruption requires that the activities are interrupted, ie that they stop, subject to one qualification which isn't really a qualification, and I will come to it in a minute, partial interruption is not enough, whatever that means. Indeed, partial interruption is a form of contradiction in terms.

Now, obviously the true construction of the word "interruption" in any BI wording depends on the context in which the word appears. But business interruption is quite an established field of insurance, and I have to tell your Lordships that not only has the FCA hitherto identified no case or textbook in which the term "interruption" in the BI context has been construed to mean some sort of partial disruption, but we have found none.

I shall come back to this point, naturally fearful

of the fact that my learned friend Mr Edelman may unearth 15 cases in his favour by the time of his reply, but he hasn't yet.

Now --

LORD JUSTICE FLAUX: That is no doubt, at least in part, because the classic BI cover is contingent on property damage.

MR GAISMAN: My Lord, property damage could produce disruption rather than interruption. Sorry, I --

LORD JUSTICE FLAUX: Yes, I suppose it could, yes. Your point is that you have not unearthed any case where it has been suggested that partial disruption amounts to interruption.

MR GAISMAN: Not yet, my Lord.

MR JUSTICE BUTCHER: The gauntlet has been well and truly thrown down, Mr Gaisman.

MR GAISMAN: I know, my Lord. That is two hostages to fortune that I have got out there, which will give me a sleepless night.

LORD JUSTICE FLAUX: It will serve you right if Mr Edelman comes back with something.

MR GAISMAN: I'm always anxious to give Mr Edelman professional satisfaction where I can.

My Lords, Hiscox's is not an unduly onerous construction for two reasons. It is said against me

that it is, that is why I am making this point.

First, one must remember that many, if not most interruptions are short-term affairs, especially the sort of interruptions resulting from the clauses under consideration in this case. Of course they can be longer, but it is important not to allow exceptional circumstances such as obtain at the moment in the present emergency unduly to colour your Lordships' thinking.

Secondly, and this is the qualification I made earlier, this is premises-based cover. That is clear from I think every clause in the wordings, and from the NDDA and public authority clauses in particular.

Hiscox does not dispute that where an insured has two separate premises, the cessation required is only a cessation at one of them, not both. Just as the inability to use or denial of access refers to these things happening at an individual premises.

So in that sense, and in that sense only, but it is really an exception, partial interruption is covered.

Where, however, you have a business, and let's treat that as our paradigm, which operates from one location, the requirement is for that business to be interrupted, ie to stop.

Now, as I say, we have not been able to find, just

to dig myself a little deeper into this whole, any English case law or textbook guidance on this question. Perhaps the point has been regarded as obvious. Nor have we found anything useful in Australia or New Zealand. However, the position in the US and Canada is a little less barren and the position appears to be uniform.

Now, again it helps to separate out the individual Hiscox strand from the FCA's omnibus case against all insurers, because they tie us in with policies involving interference, which ours doesn't, and the process of isolating the FCA's case against my clients is a helpful one.

What it reveals is that the case against us is far too broad. To demonstrate that this is so, it is hardly necessary to do more than to see what the FCA is saying about what a business interruption is against Hiscox. The key criterion, according to the FCA, for interruption is the requirement for "some operational impact"; that is the skeleton, paragraphs 159 to 160. This proposition is said to derive from The Silver Cloud, an authority which says no such thing.

The FCA also says that a business is interrupted if it is not able to carry out its operations in the manner it previously had and would ordinarily have been

carrying out those operations, without contravening the government's advice, et cetera; that is skeleton paragraph 163. An interruption occurs where "any aspect of the normal operations of the business" is, my choice of verb, impeded; {Day2/155: 9} to line 10.

And again, requiring a business to keep two metres distancing between customers and employees would ordinarily be sufficient to amount to an interruption to the insured business' activities. It impedes access to and by customers to an extent that has an major operational impact, interrupting the normal functioning of the business; paragraph 163, {Day2/154:1}.

So not only has Waitrose suffered an inability to use its premises, but it has also had its business interrupted, and so has every shop in the country permitted to stay open with a long queue of customers.

Of course, what has really happened is that the customers have had their days interrupted by having to queue, which is very different from saying the businesses have had their activities interrupted.

My Lords, every element of this case is wrong and we have explained why in our skeleton. The FCA criticises our position as extreme; that is its choice of adjective, {Day2/155:1}. However, with respect, the FCA's case is far more extreme linguistically. It

involves substituting a whole range of different concepts from the simple word used, so that any change to normal operations constitutes an interruption. The test that the FCA sets would be passed even in circumstances where the activities carry on busily. And we say that interruption requires much more than just some sort of change in the way things are done.

Now, I have already answered my Lord Lord Justice Butcher's point on the loss of attraction cover. That is in the wrong place, it doesn't deal with interruption at all, the point proves too much; see our skeleton at 285.

I should also pick up a point made by my Lord Lord Justice Flaux on {Day2/153:21} because your Lordship on this occasion cited the specified customer and supplier provisions in some of the Hiscox wordings, for example on page 41. If your Lordship has the customers and suppliers wording there, {B/6/41}, what your Lordship said was:

"So if the business has ten specified customers, one of whom has damage at his premises, so you can only deal with nine of them, unless 'interruption to your activities' means disruption as opposed to complete cessation, that cover is completely meaningless."

With great respect, my Lord, if I'm allowed to

I join issue with my Lord Lord Justice Flaux. First, and obviously, a specified supplier -- I am sure we can all agree on this -- might very easily interrupt a business completely by failing to supply a vital component.

As regards a specified customer, or indeed an unspecified customer, my Lord Lord Justice Flaux's example makes two assumptions of fact, the first express or the second perhaps not.

The first assumption is that the insured has a large number of customers. That might or might not be the case. But the second assumption is that damage at the premises of one of the customers could not cause an interruption to the insured's business.

But with great respect, my Lord, it could. For example, a small IT company has a big contract which means that all its staff are at present engaged in providing services installing an IT network at a particular customer's premises. It is not the only customer, because it has work in the diary for other customers, but for the time being its staff are taken up by a large job installing IT at the premises of a customer. There is then a fire at the premises of the customer and the work has to stop. It is easily to be understood, on the right facts, it all depends on the

facts, that the customer might terminate or suspend the contract and leave the insured without business for a while.

Or to take another example, a manufacturing business manufactures a large engine for a customer, even if only one of its customers. The inability of that customer to take delivery of that engine might cause a cessation of the business activities if, as a result, the engine had to remain occupying, as it were, the only berth in the shipyard, if I can put it that way, and thereby brought the business to a close.

In other words, there is nothing in these clauses which drives one to the conclusion that the word "interruption" should be given an eccentric, as I submit it is, meaning.

But also if I may just persevere with my Lord Lord Justice Flaux's example, in a sense it proves too much, because the implication is that any effect on the insured's business caused by damage at the premises of a specified customer qualifies as interruption. But no case has anywhere ever held this. Or to put the point another way round, my Lord's point on Day 2 leaves open the question: what is actually meant by an "interruption" if not some cessation, it may be a temporary cessation, in accordance with the natural

meaning of the word?

The FCA --

LORD JUSTICE FLAUX: Mr Gaisman, you say that "inability to use" means unable to use or not able to use to any meaningful extent. What about that for "interruption"; stopped or not able to go on to any meaningful extent?

MR GAISMAN: My Lord, that qualification is really not an available meaning of the use of the word "interruption". "Interruption" means, both etymologically and in the better primary dictionary meanings, it means a stop. That is the natural meaning. If people wanted to introduce that concept, they could have had "interference", or some yet further point such as "significant interference".

It is important to recognise, my Lord, that "inability to use" and "interruption" are separate concepts. As we say in our skeleton, even if you can show as an insured that your premises can't be used, if you are off on a 6-month world cruise your business won't have sustained an interruption, because you are not actually running the business at the time. They are separate and cumulative concepts, and it is important, not least because the loss has to be solely and directly caused by the interruption. It may be more than that, but certainly by the interruption. So these words --

LORD JUSTICE FLAUX: You would say that an example, going back to your example of the lady tailor, she uses her premises during the lockdown to service existing customers and gets a lot more new customers through online orders, and in an example such as that you could not say that there had been an interruption in her activities, irrespective of whether you could say there was an inability to use the insured premises. But they are two separate questions, aren't they?

MR GAISMAN: They certainly are, my Lord. And one can come even closer to home. Opinions are divided about whether or not the chambers in which I am sitting are chambers which I have been unable to use. That is one of the questions which divides the parties. But nobody involved in this test case, and very few people engaged in category 5, would find it possible seriously to suggest -- perhaps I shouldn't talk broadly about category 5, I will come on to it. Let's just talk about solicitors and barristers, or financial advisers or a whole range of professional people, the idea that their businesses have been interrupted can't be seriously entertained. We have had to adapt, we have had to get used to working at home and dealing with the sound of the hoover in the background, but the idea that our business has been interrupted is absurd,

irrespective of whether I am right or wrong on inability to use.

I have spent perhaps too long, in the way that one does, on my Lord Lord Justice Flaux's case in point, but the final, perhaps shamelessly defensive, point that I make is that if it is a good point that my Lord put to Mr Edelman, it is only a good point in those minority of covers where there is either, to take my Lord Mr Justice Butcher's point, a loss of attraction or my Lord Lord Justice Flaux's point, the specified customers.

Okay. Now, I have addressed your Lordships on the natural etymological dictionary meaning of the term. The parties trade not very enlightening examples involving production lines. This is a question of fact, and each of us trading examples at the extreme doesn't really help. But I would certainly say that just because one of your 3 or 5 or 8 or 2 production lines is down and there is some operational impact, that doesn't prove an interruption.

Furthermore, as is obvious, glaringly obvious actually, the FCA is trying to broaden the Hiscox cover to include interference.

Now, I am not disobeying my own rule about construing contracts by reference to what is not in

them, as I will explain, but some of the policies in this case provide cover for interruption and interference. Hiscox's do not. It would be completely incoherent for this court, if I may say so with great respect, to write a judgment, unless compelled to do so by other indications in the wordings, of which there are none, which ignore that important difference.

Now my Lord Mr Edelman submitted on Day 2 at page 155, {Day2/155:1} that interference is merely "marginally", that was the word he used, a marginally wider term than "interruption". That is quite wrong. But the FCA did not explain how the word "interference", on its case, is even marginally wider, since the criterion, some operational impact, that he puts forward is the same for both.

Let's be straightforward about this. The FCA is actually treating the two words as meaning the same thing, and how can that be right? They are different words conveying different concepts. Nor, as I said a minute ago, am I disobeying my own injunction not to construe the contract by reference to what isn't in it. As we say in our skeleton at paragraph 34, where a particular word is used in a contract and it has a settled meaning, if one party seeks to give that word a quite different meaning, it is legitimate for the

other party to point out that there exists a readily available English word which the parties could have used had they wished to effect that meaning but did not. Nothing wrong with that at all.

Next, my Lord, the Canadian authorities which we cite in our skeleton argument in paragraph 287, at {I/13/96}, are both, if I may respectfully say so, obviously right.

My learned friend dealt with the first case in paragraph 287.1, EFP Holdings, by saying that he could live with what was said in that case by Mr Justice Pitfield. He read out the middle sentence in the quotation in italics in that paragraph:

"Interruption contemplates a break in the continuity of the business."

Well, if he reads that as consistent with his submission, we will have to agree differ. But let's go on. That is interruption:

"Interference contemplates a lesser event which may not interrupt the business but impedes or interferes with the profit-making capability of the business, resulting in a diminution in gross profit."

It is quite obvious that this is not an authority which supports Mr Edelman's case. Even he did not attempt to argue that the next authority, the Le Treport

Wedding case, was an authority in his favour. In that case, as Mr Justice Gray says in paragraph 253, quoted in paragraph 287.3, it means that the business must cease operating.

The best that the FCA can say about that is that the decision is under appeal. With respect, so what? That is of no more significance than the apparent significance ascribed to the fact that the Orient-Express case settled before the Court of Appeal.

May I just have a moment.

We have, since drafting the skeleton argument, done some digging around in the United States and at {K/195.1/1} we cite a US textbook, Couch on Insurance, paragraph 167.11. I am going to take this quite shortly. It is the second paragraph beginning:

"Depending on the language of a policy, a business 'interruption' or 'suspension' triggering coverage typically involves a total cessation of business, not merely a slow-down or reduction in operations."

Then some examples are given. I don't want to discourage your Lordships from reading that, perhaps you would take a moment to read the rest of the paragraph. (Pause)

Just two cases, my Lords, which illustrate the point. I will introduce these to your Lordships, but

I will give your Lordships the references. A case called Keetch v Mutual Insurance Company, a decision of the Court of Appeals in Washington State {K/2/78.1}. My Lords, that is a 1992 decision. It was a claim by a hotel for losses resulting from a decrease in guests and a reduction in the quality of service caused by the volcanic eruption of Mount St Helens. The hotel was buried in six inches of ash but boldly remained open, and the policy had a loss of earnings endorsement covering loss of earnings resulting directly from necessary interruption of business caused by the perils insured against.

The insured was held not entitled to recover because there was no interruption, and after a review of authority the court concluded that the purpose of business interruption insurance is to indemnify for the loss due to inability to continue to use insured premises. Here the insured did not suspend its business activity, its business was not interrupted as provided for in the loss of earnings endorsement.

In the later case a few years later, in 1998, Quality Oilfield v Michigan Mutual Insurance {K/2/86.1} the Court of Appeal of Texas, the insured manufacturer of oilfield equipment suffered a burglary of engineering drawings, computer disks and design information. It

claimed business interruption losses on the basis that the items were the centre of its operations and caused an interruption of normal activity. The policy provided cover for loss resulting directly from the necessary interruption of business caused by damage to or destruction of real or personal property. Coverage was denied, by the court, on the basis that the operations were not suspended, and the court held that after considering the policy as a whole, and persuasive authority from other jurisdictions, "we find that 'interruption of business' is an unambiguous term meaning cessation or suspension of business."

I should say in both cases, my Lord, support for the court's conclusions was provided in the form of a mitigation clause which required the insured to mitigate by a "complete or partial resumption of operation of the policy". However, the presence of that clause in each case only buttressed the conclusion which the court reached anyway on the understood meaning, in the business interruption context, of the word "interruption".

My Lords, I return to the FCA's proposition that interruption requires some operational impact. Of course it does. That is paragraph 159. But that proposition is of no assistance to the FCA unless it is

to be read as something far more ambitious, which is that interruption only requires some operational impact.

I have already said, but I am going to say it again, the authority cited in support of that proposition is The Silver Cloud and I am not going to waste time looking for something in an authority which isn't there.

My Lord, a business that can carry on in part has in principle, and of course it will depend on the facts, not been interrupted, because the business activities have not ceased. Therefore, although the example cited in the FCA's skeleton at paragraph 165, of the factory with three production lines, two of which are put out of action, is a clear case of non-interruption, unless the two production lines being put out of action means that the business has to stop. There is nothing remarkable about that at all.

Of course it is a question of fact. Of course there will be cases near the borderline, that is always possible. But the test which the fact-finder must apply in each case is: did the business activities stop? In principle, therefore, and although one cannot exclude all cases, the only businesses which are likely to be able generally to prove that they were interrupted are those which were ordered to close or to cease business by what became regulations 4 and 5 of the 26 March

regulations.

Even then, and given the substantial exceptions within those businesses, the tailor, the take-away, the online mail order exceptions, there is no doubt that many businesses falling within regulations 4 and 5 will have been able to carry on, and their businesses were therefore not interrupted.

But again, my Lord, consistent with its case on "interruption" meaning mere operational impact, the FCA argues that these businesses too were interrupted unless, prior to the regulations, they were wholly take-away, wholly online or wholly mail order. Given the time I won't take your Lordship to paragraph 47 of the particulars of claim but that is what is said.

This is once more, with respect to my learned friend, obviously wrong, and produces easily imagined results which are unable as a matter of ordinary language, such as, for example, the Chinese take-away with two tables.

But can I just come back briefly to category 5 businesses, which I mentioned earlier. This is a category in which Hiscox is particularly interested; 65% of our insureds are in category 5.

These are businesses which were not ordered to close or to cease; they were permitted to remain open and

active. As your Lordships know they include accountants, lawyers, consultants, advisers, lots of other different types of professional. They also are people who, clearly, found it easiest to work from home. Insofar as they did so, their businesses were in principle not interrupted. Insofar as they could not reasonably work at home, they didn't have to; they could leave home and go anywhere where their work took them, where that work could not reasonably be done at home. It is very important to appreciate what regulation 6(2)(a) says about this. But whether or not they left home, the full panoply of modern communication tools was available to them. Nonetheless, many category 5 businesses have submitted claims.

Now as we said, if we could just get on the screen our skeleton argument, paragraph 27, {I/13/11}. I think I mean paragraph 28. I mean paragraph 28. Can we just move the page up a little. Thank you very much.

Your Lordships will be familiar with this paragraph, it came comfortingly early on in our skeleton argument, but it is very, very important. We have made a complaint here that even though they know who our insureds are, the one worked example that the FCA offers against Hiscox is of a clothes shop with no online business, as if that is somehow typical of our

clientele, and it isn't.

There is nothing in its obsession with restaurants with no take-aways or shops with no online facilities, there is no sign in the FCA's skeleton of any acknowledgment of what we all know happened for many, if not most, category 5 businesses. The fact is that for many insureds in category 5 life carried on, maybe not as normal, and with adaptations, with increased use of online facilities and so on, but I can't resist saying once that the fact that we are holding this test case as smoothly as we are is an evident demonstration that none of our businesses have been interrupted.

The FCA's counsel disagrees with all of this and at one point said --

LORD JUSTICE FLAUX: It is the interruption to your activities. The opening words of the provision talk about an interruption to your activities caused by, in this instance the restrictions, et cetera, leading to an inability to use the insured premises. And the short point is, in relation to category 5, whatever the impact was on the premises, you say there wasn't an interruption of their activities.

MR GAISMAN: There is most unlikely to have been, my Lord.

LORD JUSTICE FLAUX: Sorry, say that again.

MR GAISMAN: There is most unlikely to have been. I don't

want to commit myself to --

LORD JUSTICE FLAUX: I follow. I follow.

MR GAISMAN: -- an absolute proposition, because there will be findings of fact, and I don't want to be theological about this.

By contrast, the FCA's counsel at one stage was persuaded to say this about category 5, on {Day2/156:1}:

"I would invite Hiscox perhaps to reflect on the extremity of the position they have adopted, because if there is this restriction on their cover through the word 'interruption' it really undermines the commercial purpose of it, and one wonders what cover it would actually provide for any category 5 business because they could never suffer an interruption, as Hiscox would have it, because some work could always be done from another location."

My Lord, that is not a good point. A fire at a solicitor's office destroying its computer systems and backups could easily give rise to an interruption. A police order to evacuate an office immediately due to some emergency could do so. These are, of course, unlikely events. But professional businesses, generally advised, as in these cases, by professional insurance brokers, insure against those remote contingencies against which they wish to insure.

Just coming back to a point that my Lord Mr Justice Butcher made to me a minute ago, interruption too is a question of fact. Although it is a different question from loss of use, there may come a point, on the facts, where, to use the same adjectives as I used the, business activity is so nugatory or vestigial that to all practical intents and purposes it ceases.

It is not going to be the same test as the inability to use test, and there still has to be, and the fact-finder must direct herself or himself directly, there still has to be the test of a cessation of activities. A break. But I am not being absolutist about this. Who knows what the facts are --

MR JUSTICE BUTCHER: You seem to have slightly warmed to I think the point which I was putting to you last time, at which point you totally disagreed with it.

MR GAISMAN: My Lord, apart from the fact that I hadn't come to the relevant position in my notes, I thought what your Lordship was putting to me was that it was the same sort of question as would arise in the context of inability to use.

MR JUSTICE BUTCHER: What I was trying to put to you was that there must be an equivalent to the inability to use if the use is not meaningful, and I was thinking to myself that there might be a similar qualification to

interruption .
MR GAISMAN: Similar in an adjectival sense, if I can put it that way, but it raises a different question of fact and it in no way follows from an inability to use that there will be an interruption , assuming my vestigial qualification to both, because they are separate questions . And actually, I think I do maintain that in the case of interruption it is a slightly brighter line test , because inability to use is just a sliding scale , whereas there needs to be a threshold crossed in the case of interruption , which I submit is , in a sense, an easier thing to recognise but therefore , conversely , a harder thing for the insured to prove .
So I am not really doing any more than saying yes , it is a question of fact , and I am not being theological about it , but the legal test required is a cessation of business .
Now, my Lord, can we just --
LORD JUSTICE FLAUX: I know we are not looking at issues of fact , but I just want to try and get in my own mind what sort of situation we might be talking about then.
Taking your example of a small firm of solicitors . There is an office fire that destroys all the computers and all the records , but the solicitor carries around in his head the addresses of all his clients . So he writes

all his clients a letter over the week after the fire in which he says , " Terrible sorry , I am afraid there has been a fire . We can't service your case at the moment. But the moment that we have sorted out all the problems from the fire we will be back in touch".
In one sense the sending of those letters is part of his activities . But in another sense I think he would say in that example that his activities have been interrupted and what he is doing really is just a vestigial as it were holding the line until he can actually commence his activities again .
MR GAISMAN: There is very good reason why your Lordship is almost certainly right , because the solicitor who charged for those letters would be a bold solicitor indeed .
I see that we are getting close to the end of today, but I haven't got much more ground to cover. I will take a little time, but probably not very much time, tomorrow morning. But can I just get as far as I can this evening. I am within my agreed allocation as generously extended by grants from the likes of Mr Howard and Mr Kealey.
LORD JUSTICE FLAUX: Before you do, Mr Gaisman, just so I know, what time tomorrow morning is it proposed to resume?

MR JUSTICE BUTCHER: You are on mute, Mr Gaisman.
MR GAISMAN: Thank you. I was going to ask either tomorrow morning or Wednesday morning for an extra half an hour on the basis that there were two extra half hours in the FCA interveners' time last week.
LORD JUSTICE FLAUX: Subject to my Lord I am happy to start at 10.00 am tomorrow.
MR GAISMAN: My Lord, can I turn to paragraph 381 of the FCA's skeleton on page 142. {I/1/142} The trouble with this paragraph is that it indicates the sort of cast of mind with which the authors of this skeleton are approaching these sort of cases , including category 5 cases .
I think I can pick it up in line 4:
"Hiscox raises the argument ..."
LORD JUSTICE FLAUX: It has not come up yet, Mr Gaisman.
MR GAISMAN: Right. {I/1/142}
Could we just make that a bit bigger , please , and I am starting in line 4:
"Hiscox raises the argument that if work could reasonably be done at home then the insured's business did not sustain an interruption . This is wrong. The fact that an insured may be able to restart some of its activities from another location does not mean that its normal business or business activities have not been

interrupted ; it simply means that the insured has taken efforts to minimise losses , as required by the policies (and if it has increased cost of working cover such increased costs will be recoverable). Once there has been an interruption there is an indemnity for the period during which the business is affected ."
I will come back to that:
"Any small contributions made by home-working to gross profit will of course be taken into account in a quantum calculation ."
Now, my Lord, there are several examples in that short passage of tendentiousness , begging the question , slanting the case in the most unfavourable way to the facts that we all know have been the typical experience of category 5 businesses who are being referred in this paragraph. The use of the word " restart " begs the question . We have obviously got far too broad a definition in terms of normal business activities having been interrupted . It is assumed that any contributions from home-working are small contributions . What is the justification for that . And I will come back, because in a sense that is a most serious fallacy of all , to the sentence:
"Once there has been an interruption there is an indemnity for the period during which the business is

affected ."

But also the word " restart " doesn't only beg the question, but it also implies that a professional who chooses to spend a working day rather than a weekend day carrying files, computers, equipment, whatever tools of the trade he needs, in his car from his office to his home, that such a person has suffered a business interruption. That is extremely unlikely.

Nor to pick up the other point which we get in paragraph 380 {I/1/141} ... I think it is 380. There is a suggestion that our construction punishes those assureds who are adaptable enough to avoid or to minimise any interruption.

I am just trying to find the quotation. It is the top of the same page we are looking at:

"Construing interruption to require a full cessation would punish actions taken by a policyholder."

Now my learned friend, as I understand it, concedes in the passage that I have read, and also on {Day2/147:1} that the costs of adaptation would ordinarily be recoverable under the increased costs of working. He is right. But then he says, so you gain the costs of setting up your take-away service at the price of losing your business interruption cover.

Even though it is 26 minutes past 4 it will be

immediately obvious that my learned friend assuming in the FCA's favour the very question we are debating, which is whether he has lost anything at all; what is the scope of the cover in the first place and does it cover any departure from normal working.

My Lords, in the time available can I make one more point, but it is an important point, and if it takes me five minutes not three will that inconvenience your Lordships? I hope not.

Can we go back to page 41 in the Hiscox wordings and the step. It is the words " solely and directly ". {B/6/41}. Your Lordship is very familiar with where these sit. But there is an issue between the parties, and I am not on this issue, I am on a different point.

The issue between the parties is what words " solely and directly " qualifies. Assume I am wrong about that. One thing that is quite clear is that the interruption has to be the sole and direct cause of the loss. Nobody could argue to the contrary. So concurrent proximate causes of loss are excluded.

Now the rhetorical question which the FCA poses in its skeleton at paragraph 394 -- it is quite generally put -- did losses result solely and directly from the interruption. In general terms of course they did, it says.

My Lords, as a general proposition nothing could be less self-evident.

Take a category 5 business which relocates to home-working. Let it be assumed in my learned friend's favour that the adaptation is so complicated and difficult that on the facts there is an interruption, let's say for a week, and then the business is up and running again. Working from home is not ideal and general COVID effects reduce the amount of business, and the turnover, but the business activities have resumed. From the date of the resumption it would be impossible to say that the interruption continues.

In the passage I have just read your Lordship from paragraph 381 the FCA says once there has been an interruption there is an indemnity for the period during which the business is affected.

As a description of the indemnity period that is unexceptionable. But the losses, as we see, have to be solely caused by the interruption. That is what the clause says.

In the case of the category 5 business that has painfully relocated, it is highly unlikely that once it is up and running again the loss, the diminution in profits that it experiences as a result of general COVID-related activities, will have been solely caused

by the interruption, or indeed caused by the interruption at all.

Of course, if there is some specific business opportunity which has come and gone specifically and solely as a result of the interruption, that is different. But in the ordinary case where you have a short period of interruption and then you carry on as best you can, working from home, clearly carrying on working, and your business is affected because everybody's business is affected, economic activity is down, how can that be said, that loss, after the resumption, to be caused solely or indeed at all by the interruption. The answer is that it can't.

If we apply this sort of example -- and this is my last point -- to the FCA's paragraph 394.3 {I/1/146}, please, paragraph 394.3, my learned friends say things like in the middle of the paragraph:

"What is left if one takes away the interruption to the business (not the cause of the interruption; the interruption itself). The answer is, nothing or very little."

Then it goes on:

" ... the fall in economic activity is not a separate cause. It was caused by the interruption in activities to the business ..."

And you can read to the end of the paragraph.

In the instance I have given, which will be typical of a lot of businesses, the loss of a resumption will not have been caused solely by the interruption but by other broader COVID-related factors.

The truth is that once one understands what is being said by the FCA -- this is part of its jackpot argument -- once it gets its fruits in a row on the fruit machine the fruit machine pays out a jackpot, but this is in a sense only an exemplification of my point that you have to look and see what the clause requires.

I have talked about pipelines, and it is time for me to stop making submissions to your Lordship, but the last pipeline after pipeline (d) is that the interruption must be the sole cause of the loss. And in the example I have given, and many similar examples, that will simply not be the case. But the FCA seems to think it axiomatically follows. The reverse is true.

I am sorry to have taken a bit longer than I should have done.

LORD JUSTICE FLAUX: Very well. Not to worry, Mr Gaisman. We will break there until 10.00 am tomorrow morning, please. Thank you.

(4.33 pm)

(The hearing adjourned until 10.00 am on Tuesday,

28 July 2020)

INDEX

F

G